FOR ARGUMENT

12

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Nos. 02-1674, et al.

In the Supreme Court of the United States

MITCH MCCONNELL, UNITED STATES SENATOR, ET AL., APPELLANTS/CROSS-APPELLEES

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL ELECTION COMMISSION, ET AL. (PAGE PROOF VERSION)

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QUESTIONS PRESENTED

In 2002, the President signed into law the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, which amends the Federal Election Campaign Act (FECA), 2 U.S.C. 431 *et seq.* BCRA is designed to address various well-documented abuses associated with the financing of federal election campaigns. The questions presented are as follows:

1. Whether new FECA § 323(a) (added by BCRA § 101), which prohibits national political parties from soliciting or receiving funds except in compliance with FECA's disclosure requirements and source-and-amount contribution restrictions, is constitutional.

2. Whether new FECA § 323(b) (added by BCRA § 101), which generally requires that funds spent by state parties on four specified categories of "Federal election activity" must be raised in compliance with FECA's disclosure requirements and source-and-amount contribution restrictions, is constitutional.

3. Whether new FECA § 323(d) (added by BCRA § 101), which prohibits national and state political parties from soliciting funds for certain tax-exempt organizations, or making donations to such organizations, is constitutional.

4. Whether new FECA § 323(e) (added by BCRA § 101), which prohibits federal office-holders and candidates from soliciting funds for federal or state electoral campaigns except in compliance with FECA's source-and-amount contribution restrictions, is constitutional.

5. Whether new FECA § 323(f) (added by BCRA § 101), which provides that funds used by state candidates and office-holders for communications that promote or attack a federal candidate must be raised in compliance with FECA's

disclosure requirements and source-and-amount contribution restrictions, is constitutional.

6. Whether BCRA § 213, which requires political parties under certain circumstances to choose between making independent or coordinated expenditures in support of their federal candidates, is constitutional.

7. Whether the source-of-funding limitation and disclosure requirements pertaining to "electioneering communications," imposed by BCRA §§ 201-203 and 311, are constitutional.

8. Whether the district court correctly dismissed plaintiffs' challenges to BCRA § 214(a)-(c), which states that expenditures coordinated with a political party shall be treated as contributions to the party (§ 214(a)); directs the Federal Election Commission to promulgate new regulations governing "coordinated communications" (§ 214(b)); and provides that those regulations "shall not require agreement or formal collaboration to establish coordination" (§ 214(c)).

9. Whether the district court correctly dismissed plaintiffs' challenge to BCRA § 307, which increases from $1000 to $2000 the per-election limit on an individual's contributions to a federal candidate.

10. Whether the district court correctly dismissed plaintiffs' challenge to BCRA §§ 304 and 319, which establish increased contribution limits in certain circumstances when a candidate faces an opponent who expends substantial personal funds, beyond a statutory threshold amount, on his own campaign.

11. Whether the district court correctly dismissed plaintiffs' challenge to BCRA § 305, which imposes certain conditions on a federal candidate's entitlement to the "lowest unit charge" for broadcast advertising.

12. Whether the reporting and record-keeping requirements imposed on broadcast stations by BCRA § 504 are constitutional.

13. Whether BCRA § 318, which prohibits minors from making contributions to federal candidates or political party committees, is constitutional.

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v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE FEDERAL ELECTION COMMISSION, ET AL.[1]

OPINION BELOW

The opinion of the district court (Supp. App. 1sa-1382sa) is reported at 251 F. Supp. 2d 176.

JURISDICTION

The judgment of the district court was entered on May 2, 2003. This Court noted probable jurisdiction on June 5, 2003. The jurisdiction of this Court rests on the Bipartisan

[1] This brief is filed on behalf of the Federal Election Commission (FEC) and David M. Mason, Ellen L. Weintraub, Danny L. McDonald, Bradley A. Smith, Scott E. Thomas, and Michael E. Toner, in their capacities as Commissioners of the FEC; John Ashcroft, in his capacity as Attorney General of the United States; the United States Department of Justice; the Federal Communications Commission; and the United States of America. Those parties are appellants in *Federal Election Commission* v. *Mitch McConnell, United States Senator*, No. 02-1676.

Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 4, Clause 1 of the United States Constitution is reproduced at 02-1676 J.S. App. 10a.

2. The First Amendment to the United States Constitution is reproduced at 02-1676 J.S. App. 11a.

3. The Fifth Amendment to the United States Constitution is reproduced at 02-1676 J.S. App. 12a.

4. The Tenth Amendment to the United States Constitution is reproduced at 02-1676 J.S. App. 13a.

5. The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, is reproduced at 02-1676 J.S. App. 14a-86a.

STATEMENT

These consolidated cases arise out of pre-enforcement facial constitutional challenges to various provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81. A three-judge panel of the District Court for the District of Columbia sustained several of the challenged BCRA provisions, held that other provisions violate the First Amendment, and found that certain of the constitutional challenges are not justiciable in the present suits.

1. "[T]he history of federal campaign finance regulation, having its origins in the Administration of President Theodore Roosevelt, is a long-standing and recurring problem that has challenged our government for nearly half of the life of our Republic." Supp. App. 16sa (per curiam). This Court has previously canvassed the history of such regulation and has repeatedly recognized Congress's authority to protect the integrity of federal elections and prevent corruption of federal office-holders. See, *e.g.*, *FEC* v. *Beaumont*, 123 S. Ct. 2200 (2003); *FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001) (*Colorado II*); *FEC* v. *National Right to Work Comm.*, 459 U.S. 197 (1982) (*NRWC*); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam); *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972); *United States* v. *Automobile Workers*, 352 U.S. 567 (1957) (*UAW*); *United States* v. *CIO*, 335 U.S. 106, 113 (1948). As the district court explained, Supp. App. 15sa-40sa (per curiam), the development of federal campaign-finance regulation has followed a pattern of congressional action to address particular electoral abuses; attempts to circumvent the limitations established by Congress; and renewed legislative action to respond to the efforts at circumvention and "plug [an] existing loophole." *UAW*, 352 U.S. at 582. After years of deliberation and debate, Congress enacted BCRA to adjust the existing statutory scheme in light of "burgeoning problems with federal campaign finance laws" experienced in the prior decade. Supp. App. 40sa (per curiam).

2. BCRA amends the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.* The Federal Election Commission (FEC) is empowered to administer and enforce FECA's provisions. See generally 2 U.S.C. 437c(b)(1), 437d(a), 437g. Two central features of the pre-BCRA statutory regime are of particular significance here. First, federal law has long prohibited the use of corporate and labor union general treasury funds for contributions or expenditures in connection with federal elections, while allowing such contributions or expenditures to be made through separate segregated accounts. 2 U.S.C. 441b. Second, for more than 25 years, FECA has limited the amounts of money that individuals and unincorporated associations may contribute to federal candidates, political parties, and independent political committees. 2 U.S.C. 441a.

a. *Prohibited sources of federal campaign spending*: The cornerstone of federal campaign-finance regulation is the

longstanding prohibition against the use of corporate general treasury funds for contributions and expenditures in connection with federal elections. See 2 U.S.C. 441b; see generally *Beaumont*, 123 S. Ct. at 2205-2206 (summarizing historical development of relevant legislation); see also pp. 74-76, *infra*. In 1907, Congress first prohibited any corporation from making a "money contribution" in connection with a federal election. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864-865. Congress has since extended that ban to cover "expenditures" as well as "contributions," and to subject labor unions as well as corporations to the prohibition on federal campaign spending. See *UAW*, 352 U.S. at 582-583.

Corporations and unions are permitted to establish and administer separate segregated accounts (commonly called political action committees or "PACs") for the purpose of making political contributions and expenditures, using funds collected from stockholders, members, or certain other personnel and relatives. See 2 U.S.C. 441b(b)(2)(A)-(C); *Pipefitters*, 407 U.S. at 409-410; *Beaumont*, 123 S. Ct. at 2203, 2211. Money so acquired can be contributed by the PAC to federal candidates (subject to FECA's contribution limits) or used to pay for independent campaign-related spending. See Supp. App. 62sa-63sa (per curiam).

This Court has squarely held that Congress and the state legislatures may prohibit the use of corporate and union general treasury funds for election-related contributions and expenditures, and may require instead that corporations and unions finance their election-related spending with money contributed specifically for that purpose. In *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990), this Court considered and rejected a First Amendment challenge to a Michigan statute, modeled on 2 U.S.C. 441b, that "prohibit[ed] corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office." *Id.* at 654.

The Court held that corporations may be barred from using treasury funds to make independent expenditures for the purpose of influencing electoral results, at least so long as they retain the option of establishing separate segregated accounts to finance such communications. *Id.* at 657-661.

In *Beaumont*, this Court reaffirmed the validity of 2 U.S.C. 441b's prohibition on the use of corporate treasury funds for federal campaign contributions. 123 S. Ct. at 2205-2211. The Court observed that any constitutional challenge to that ban "goes against the current of a century of congressional efforts to curb corporations' potentially 'deleterious influences on federal elections.'" *Id.* at 2205 (quoting *UAW*, 352 U.S. at 585). The Court explained that the ban on corporate treasury contributions serves (1) to prevent actual or apparent corruption of federal office-holders, (2) to protect the interests of individuals who have paid money to a corporation or union for non-political purposes, and (3) to prevent circumvention of other contribution limits. *Id.* at 2206-2207.

b. *Amount limitations on federal campaign contributions from permitted sources*: FECA was intended to reduce "the actuality and appearance of corruption" resulting from the "opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley*, 424 U.S. at 26-27. As amended in 1974, FECA prohibited individuals from contributing more than $1000 per election to any candidate for federal office, or more than $25,000 per year to all federal candidates and political committees (including political parties) combined. 18 U.S.C. 608(b)(1) and (3) (Supp. IV 1970). In *Buckley*, this Court upheld those contribution limits against a First Amendment challenge. 424 U.S. at 12-38.

The *Buckley* Court explained that

> [t]he Act's $1,000 contribution limitation focuses precisely on the problem of large campaign contributions—the narrow aspect of political association where the actuality and potential for corruption have been identified—while leaving persons free to engage in independent political expression, to associate actively through volunteering their services, and to assist to a limited but nonetheless substantial extent in supporting candidates and committees with financial resources.

424 U.S. at 28. The Court found "no indication" that the FECA limits would prevent effective electoral advocacy, explaining that "[t]he overall effect of the Act's contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons." *Id.* at 21-22. The Court also upheld the $25,000 annual ceiling on an individual's aggregate contributions to all federal candidates and political committees, characterizing it as a "quite modest restraint upon protected political activity" that "serves to prevent evasion of" FECA's $1000 limit on individual contributions to candidates. *Id.* at 38.[2]

In *Nixon* v. *Shrink Missouri Government PAC*, 528 U.S. 377 (2000), the Court reaffirmed the holding in *Buckley* that reasonable limits on contributions to political candidates do not violate the First Amendment. The Court observed that contribution limits reflect "a concern not confined to bribery

[2] At the time *Buckley* was decided, FECA did not impose a specific ceiling on an individual's contributions to a political committee, including a national or state party committee. Thus, the only practical limitation on the amount that an individual could contribute to such entities was the $25,000 annual aggregate limit on an individual's overall contributions. Limits on individual contributions to national parties and to other political committees were added to FECA in 1976. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, Tit. I, § 112(2), 90 Stat. 486-487; see p. 7, *infra*.

of public officials, but extending to the broader threat from politicians too compliant with the wishes of large contributors." *Id.* at 389. In rejecting the contention that the challenged contribution limits were too low, the Court framed the applicable test as "whether the contribution limitation [i]s so radical in effect as to render political association ineffective, drive the sound of a candidate's voice below the level of notice, and render contributions pointless." *Id.* at 397.

3. *Developments leading to enactment of BCRA:* Before BCRA was enacted, application of FECA's source-and-amount restrictions to a donation received by a national or state political party committee turned on the uses to which the relevant funds were put. As amended in 1976 (see note 2, *supra*), FECA imposed a $20,000 limit on an individual's "contributions" to a national political party committee, and a $5000 limit on individual "contributions" to other political committees, including state party committees. See 2 U.S.C. 441a(a)(1)(B) and (C) (1976).[3] Those limits remained in effect until the enactment of BCRA. The term "contribution" was (and is) defined to mean a gift or similar transfer made "for the purpose of influencing any election for Federal office." 2

[3] The term "political party" is defined to mean "an association, committee, or organization which nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C. 431(16). FECA imposes generally applicable limits on the amount that one "political committee" as defined in the Act may contribute to a federal candidate or to another "political committee." See 2 U.S.C. 441a(a)(1) and (2). The Act provides, however, that "[t]he limitations on contributions contained in paragraphs (1) and (2) do not apply to transfers between and among political committees which are national, State, district, or local committees (including any subordinate committee thereof) of the same political party." 2 U.S.C. 441a(a)(4). Party committees remain free under BCRA to transfer funds amongst themselves without being subject to the limits that otherwise apply to contributions made by one political committee to another.

U.S.C. 431(8)(A)(i). FECA also prohibited the use of corporate or union general treasury funds for contributions in connection with any federal election. 2 U.S.C. 441b; see pp. 3-5, *supra*. Party activities intended to influence federal elections were thus required to be financed with funds, known as "hard" or "federal" money, that had been raised in compliance with FECA's disclosure requirements and source-and-amount contribution limits.

Political parties were also permitted, however, to raise additional funds, known as "soft" or "nonfederal" money, and to spend those funds for activities intended to influence state or local elections. Because donations used for such purposes did not fall within the FECA definition of a "contribution," they could lawfully be made outside the framework of the FECA source-and-amount limits. The "soft money" given to national and state parties included donations of corporate or labor union general treasury funds, as well as individual donations in amounts well above the applicable FECA contribution limits.[4]

Application of the FECA contribution limits to funds used for various "party-building" activities (*e.g.*, get-out-the-vote drives, or generic party advertising), which influence the outcome of *both* federal and state elections, proved to be difficult. "Since early in its history, the Commission has struggled with the fact that many party functions have an impact on both federal and non-federal elections." 63 Fed. Reg. 37,723 (1998). In a series of advisory opinions, informational letters, and formal rulemakings, the FEC has

[4] Thus, under the pre-BCRA regime, an individual who wished to donate $100,000 to a national party committee would have been permitted to contribute up to the $20,000 FECA limit in "hard" or "federal" money contributions (which could lawfully be used to influence federal elections), and could have designated an additional $80,000 for deposit in a "soft money" account (which could not legally be used for federal-election purposes).

addressed the use of soft money to fund such activities. See *id.* at 37,723-37,724 (summarizing history of FEC regulatory efforts); Supp. App. 29sa-34sa (per curiam) (same).

The FEC initially appeared to take inconsistent positions on the question whether party activities having a likely effect on both federal and state elections could be financed in part with funds (*e.g.*, corporate donations) raised outside the framework of FECA's source-and-amount limits. See Supp. App. 29sa-30sa (per curiam). Regulations promulgated in 1976 clarified the Commission's views. Those rules authorized any political committee to establish separate federal and non-federal accounts, and to allocate its administrative expenses between the accounts. 11 C.F.R. 102.6(a)(2) and 106.1(e) (1977); see Supp. App. 30sa (per curiam). Advisory opinions issued in 1978 and 1979 allowed state and national party committees to accept corporate and union treasury funds for deposit in a non-federal account, and permitted the parties to allocate the costs of voter registration and get-out-the-vote activities between the federal and non-federal accounts in the same manner as administrative expenses. *Ibid.* Thus, "by the middle of 1979, the FEC permitted national and state party committees to solicit and accept donations outside of FECA's source and amount limitations * * * provided that these monies were placed in separate accounts from the federal funds." *Id.* at 30sa-31sa. From that time until the enactment of BCRA, moreover, the FEC's consistent view was that the costs of activities that influence both federal and state elections could be allocated between a party committee's hard- and soft-money accounts.

In 1990, the FEC promulgated regulations that required various party expenses to be funded in part with hard money, and that established formulas to be used in allocating those expenses. See 55 Fed. Reg. at 26,058 (announcing final

rules).[5] Those regulations, which remained substantially unchanged until the Commission's promulgation of new rules to implement BCRA, applied to party committees' "[a]dministrative expenses" (11 C.F.R. 106.5(a)(2)(i) (2002)) and to their expenses for, *inter alia*, "[g]eneric voter drives," which included "voter identification, voter registration, and get-out-the-vote drives." 11 C.F.R. 106.5(a)(2)(iv) (2002). National party committees were required to allocate at least 65% of those expenses to federal accounts during presidential election years, and at least 60% in non-presidential election years. 11 C.F.R. 106.5(b) and (c) (2002). For state and local parties, the allocation was determined by the proportion of federal offices to all offices on the state's general election ballot. See 11 C.F.R. 106.5(d) (2002).

4. *The provisions of BCRA:* "In the area of campaign finance regulation, congressional action has been largely incremental and responsive to the most prevalent abuses or evasions of existing law at particular points in time." Supp. App. 481sa (Kollar-Kotelly); see *id.* at 15sa-40sa (per curiam) (reviewing Congress's incremental approach to campaign-finance regulation); *NRWC*, 459 U.S. at 209 (discussing Congress's "cautious," "step by step" approach). BCRA is the product of more than six years of intensive congressional study and debate. See Supp. App. 40sa-47sa (per curiam). In crafting the statute, Congress sought principally to address (1) the potential for corruption of federal office-

[5] In *Common Cause* v. *FEC*, 692 F. Supp. 1391, 1394-1396 (D.D.C. 1987), the district court accepted in principle the FEC's determination that the costs of party activities affecting both state and federal elections could be allocated between hard-and soft-money accounts, but held that the Commission had failed to provide sufficient guidance regarding the proper method(s) of allocation. See 55 Fed. Reg. at 26,058. The 1990 regulations were intended to "provide committees with significantly more guidance on how they are to allocate their administrative expenses and costs for combined federal and non-federal activities." *Id.* at 26,059; see Supp. App. 33sa (per curiam).

holders that is created by soft-money donations to political parties; and (2) the growing use of corporate and union general treasury funds for communications that are designed to influence, or are likely to have the effect of influencing, the outcome of federal candidate elections.

a. In recent years, soft-money donations to political parties have increased dramatically. See Supp. App. 34sa-35sa, 38sa (per curiam) (national parties' soft-money spending increased from $80 million in 1992 to $272 million in 1996 and $498 million in 2000). In addition to funding an allocable share of administrative and generic party-building expenses, as specifically contemplated by FEC regulations, soft money has been used to purchase advertisements that have featured federal candidates but have not expressly advocated a particular electoral result. See *id.* at 35sa-36sa. The parties have paid for such advertisements "with a mix of federal and nonfederal funds as permitted by FEC allocation rules." *Id.* at 36sa. Under the pre-BCRA regime, national party funds were often transferred to state parties for use in such activities because FEC regulations established more favorable allocation formulas (i.e., permitted greater use of soft money) for state than for national party committees. See *ibid.*[6] In addition, large-scale soft-money donors frequently sought and were granted special access to federal office-holders, with the attendant potential to influence legislation, through arrangements brokered by the political parties. See Supp. App. 567sa-626sa (Kollar-Kotelly); pp. 37-41, *infra*.

Congress enacted Title I of BCRA to prevent the real or apparent corruption of federal office-holders that may result

[6] The record evidence in this case indicates, and two members of the district court panel specifically found, that national party officials characteristically have insisted on retaining control of the content of advertisements that were financed with money transferred from national to state party committees. See Supp. App. 522sa-523sa, 524sa-525sa (Kollar-Kotelly); *id.* at 1234sa (Leon).

from political parties' solicitation and receipt of donations made either (i) from sources (principally corporate and union general treasury funds) that have historically been barred from making contributions in connection with federal elections, or (ii) in amounts that exceed the FECA limits on contributions by other donors. BCRA § 101(a) adds a new FECA § 323, which consists of several interrelated provisions designed to ensure "that national parties, federal officeholders and federal candidates use only funds permitted in federal elections to influence federal elections, and that state parties stop serving as vehicles for channeling soft money into federal races to help federal candidates." 147 Cong. Rec. S3251 (daily ed. Apr. 2, 2001) (statement of Sen. Thompson).[7]

New FECA § 323(a)(1) provides that "[a] national committee of a political party (including a national congressional campaign committee of a political party) may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of [FECA]."[8] That provision

[7] Although Title I of BCRA restricts the ability of political parties to obtain donations from prohibited sources or in amounts that exceed the FECA contribution limits, the limits themselves have been increased by other BCRA provisions. Individuals are now permitted to contribute up to $25,000 per year to any national political party committee, $10,000 per year to any state party committee, and $2000 per election to any federal candidate. See BCRA §§ 102(3), 307(a)(1) and (2). The overall annual limit is now $37,500 per election cycle for contributions to candidates and $57,500 for other contributions (of which not more than $37,500 may be attributable to contributions to political committees that are not national party committees). See BCRA § 307(b). Most of the current contribution limits are indexed for inflation. See BCRA § 307(d); Supp. App. 472sa (Henderson).

[8] Currently operating under the auspices of the two major political parties are a total of six national committees: the Republican National Committee, the National Republican Senatorial Committee, the National Republican Congressional Committee, the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee. See J.S. Supp. App. 544sa (Kollar-Kotelly); *id.* at 1186sa (Leon). Of those six committees, only the Republican National Committee is a party to the instant cases.

imposes no limits on how the national party committees may spend their money. Rather, it is directed solely at the *acquisition* of funds: its purpose and effect is to require that all money solicited and received by national parties will be treated as "contributions" subject to the longstanding disclosure requirements and source-and-amount restrictions imposed by FECA.

New FECA § 323(b) addresses the acquisition by state and local party committees of funds they use to affect federal elections. New FECA § 323(b)(1) provides as a general rule that any disbursements made by a state, district, or local committee of a political party for "Federal election activity" must "be made from funds subject to the limitations, prohibitions, and reporting requirements of [FECA]." The term "Federal election activity" is defined to include (i) voter registration activity within the 120 days before a federal election; (ii) voter drives and generic campaign activities "conducted in connection with an election in which a candidate for Federal office appears on the ballot"; (iii) any "public communication that refers to a clearly identified candidate for federal office * * * and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office"; and (iv) all services provided by any employee who devotes more than 25% of his compensated time in any month to activities in connection with federal elections. See BCRA § 101(b) (adding FECA § 301(20)(A)(i)-(iv)). New FECA § 323(b)(2)—known as the "Levin Amendment"—establishes exceptions to that general rule, authorizing state-level party committees to use soft money in limited amounts, raised under certain restrictions, to fund

an allocated portion of the costs of specified activities that affect both federal and state elections. See Supp. App. 56sa (per curiam). BCRA imposes no limit on the amount of money that a state party committee may spend on "Federal election activity"; it simply requires the party committee to comply with FECA's source-and-amount restrictions in raising funds used for such activities.

New FECA § 323(d) prohibits political party committees from soliciting any funds for, or making or directing any donations to, certain organizations described in Sections 501(c) and 527 of the Internal Revenue Code. See Supp. App. 57sa-58sa (per curiam). New FECA § 323(e)(1) provides that federal candidates and officeholders may solicit funds in connection with any federal or non-federal election only if the amount solicited is "not in excess of" the applicable FECA/BCRA contribution limit and the solicitation is "not from sources prohibited by the Act." See Supp. App. 58sa (per curiam). Finally, new FECA § 323(f) prohibits any state or local office-holder, or any candidate for such office, from spending soft money for a public communication that promotes or attacks a candidate for federal office. See Supp. App. 59sa (per curiam).

b. Title II of BCRA addresses the escalating use of union and corporate treasury funds for broadcast advertising that is likely to influence the outcome of federal elections, yet escaped federal regulation under the prior legal regime. Federal law has long prohibited corporations and labor unions from spending general treasury funds to influence federal elections. See 2 U.S.C. 441b; pp. 3-5, *supra*. This Court, however, has construed 2 U.S.C. 441b's restrictions on corporate and union independent campaign expenditures to apply only to communications that "expressly advocate" the election or defeat of an identified federal candidate. *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238,

248-249 (1986) (*MCFL*).[9] With respect to persons other than political committees, the Court has interpreted FECA's requirements for disclosure of independent political expenditures (2 U.S.C. 434(c)) in a similar manner. See note 9, *supra*. In recent years and with increasing frequency, corporations and unions have spent hundreds of millions of dollars in general treasury funds to pay for so-called "issue advocacy" campaigns, disseminating advertisements that praise or denounce a candidate for federal office but do not use terms that explicitly urge his election or defeat. See Supp. App. 38sa-39sa (per curiam). Because those advertisements do not include words of express advocacy, the corporate or union disbursements used to finance them have entirely escaped regulation under FECA.

Subtitle A of Title II of BCRA reflects Congress's effort to identify, through precise and easily administrable standards, an important category of advertisements, "electioneering communications," that can be expected to influence federal elections, whether or not they contain "express advocacy." New FECA § 304(f)(3) (added by BCRA § 201(a)) defines the term "electioneering communication" to mean (i) a television or radio communication that (ii) "refers to a clearly identified candidate for Federal office"; (iii) is made within the 60 days before the federal general election, or the 30 days before the federal primary election, in which the identified candidate is running; and (iv) is "targeted to the relevant electorate" (meaning that it can be received by at least 50,000 persons in the State or district where the

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[9] The Court in *MCFL* based that holding on *Buckley*'s similar construction of other FECA provisions pertaining to independent campaign expenditures. See 479 U.S. at 248-249; p. 79, *infra*. Neither the validity nor the proper construction of 2 U.S.C. 441b was at issue in *Buckley*.

election is to be held). See Supp. App. 59sa-60sa (per curiam).[10]

BCRA § 203(a) amends FECA § 316(b)(2) (2 U.S.C. 441b(b)(2)) to provide that corporate and labor union general treasury funds, whose use for express advocacy has long been forbidden, likewise may not be used to finance "electioneering communications" as defined in BCRA. See Supp. App. 61sa (per curiam). "The prohibition on electioneering communications only applies to the general treasury funds of national banks, corporations, and labor unions, or any other person using funds donated by these entities." *Id.* at 62sa. Because BCRA does not alter the pre-existing FECA provisions that allow corporations and labor unions to use funds from separate segregated accounts (or PACs) for the purpose of influencing federal elections, such funds may lawfully be used to sponsor electioneering communications. See 2 U.S.C. 441b(b)(2)(C) and (4); Supp. App. 62sa (per curiam).

New FECA § 304(f)(1)-(2) (added by BCRA § 201(a)) requires that any person who spends more than $10,000 on electioneering communications in a calendar year must file statements with the FEC that identify, *inter alia*, the persons making the disbursements, those to whom the disbursements were made, and the persons who contributed $1000 or more to the persons making the disbursement. New FECA § 304(f)(5) provides that "[f]or purposes of this subsection, a

[10] BCRA also includes a backup definition of the term "electioneering communication," to be used in the event that the primary definition is held to be unconstitutional. Under the backup definition, "the term 'electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate for [federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." BCRA § 201(a) (adding FECA § 304(f)(3)(A)(ii)); see Supp. App. 61sa (per curiam); compare 11 C.F.R. 100.22(b).

person shall be treated as having made a disbursement if the person has executed a contract to make the disbursement."

BCRA also includes provisions updating FECA's regulation of coordinated expenditures. BCRA § 202 amends FECA § 315(a)(7) to provide that any disbursement for an electioneering communication that is coordinated with a candidate or political party shall be treated as a contribution to the candidate or party. BCRA § 214(a) states that "expenditures" made in coordination with political party committees will be treated as contributions to the party. BCRA §§ 202 and 214(a) parallel pre-existing FECA provisions under which campaign spending in coordination with a candidate is treated as a contribution to the candidate. See 2 U.S.C. 441a(a)(7)(B)(i); see also *Buckley*, 424 U.S. at 46 (noting that "controlled or coordinated expenditures are treated as contributions rather than expenditures under the Act"); Supp. App. 70sa (per curiam); *id.* at 385sa-386sa (Henderson). BCRA § 214(b) repeals FEC regulations promulgated in December 2000 that address coordinated communications financed by persons other than candidates or parties, and BCRA § 214(c) directs the FEC to promulgate new rules on the subject that "shall not require agreement or formal collaboration to establish coordination."

c. Title II of BCRA also addresses campaign expenditures made by political parties in support of their candidates. Although expenditures coordinated with federal candidates are subject as a general rule to FECA's contribution limits, FECA allows political party committees to make coordinated expenditures in amounts much greater than the limits that apply to other donors. Thus, while other multi-candidate political committees can contribute no more than $5000 per election to a candidate, see 2 U.S.C. 441a(a)(2)(A), party committees are permitted to make contributions in the form of coordinated expenditures that far exceed that amount, see 2 U.S.C. 441a(d); *Colorado II*, 533 U.S. at 455; *Colorado*

Republican Fed. Campaign Comm. v. *FEC*, 518 U.S. 604, 610-611 (1996) (opinion of Breyer, J.) (*Colorado I*).[11] Under this Court's decision in *Colorado I*, political party committees also have a First Amendment right to make unlimited independent expenditures to support the party's candidates. See *id.* at 608, 618 (opinion of Breyer, J.); *id.* at 629-631 (opinion of Kennedy, J.); *id.* at 648 (opinion of Thomas, J.).

BCRA § 213 alters the range of spending options available to a party committee, while preserving the party's statutory prerogative of making coordinated expenditures well in excess of the contribution limits that apply to other donors. After a party has nominated a candidate for a particular federal election, Section 213 requires the party either (1) to forgo independent expenditures in support of that candidate, while remaining free to invoke the increased coordinated-

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[11] The national committee of a political party may make coordinated expenditures of up to 2 cents multiplied by the voting age population of the United States in support of a Presidential candidate. See 2 U.S.C. 441a(d)(2); 11 C.F.R. 109.32(a). The national committee and a state party committee may each make coordinated expenditures of up to the greater of $20,000 or 2 cents multiplied by the voting age population of a State in support of the State's candidate for Senator, and up to $10,000 in support of a candidate for Representative. See 2 U.S.C. 441a(d)(3); 11 C.F.R. 109.32(b). National and state party committees are permitted to assign their authority to make coordinated expenditures to another political party committee. 11 C.F.R. 109.33(a); *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981) (*DSCC*). The statutory limits are adjusted each year for inflation. 2 U.S.C. 441a(c); 11 C.F.R. 109.32(b)(3). In the year 2000, the limits on those additional coordinated expenditures ranged from $33,780 to $67,560 for House of Representative races, and from $67,560 to $1.6 million for Senate races. See *Colorado II*, 533 U.S. at 439 n.3. The FEC interprets 2 U.S.C. 441a to permit national and state political parties to make direct contributions to a candidate of up to $5000 (the limit applicable to contributions by political committees generally under 2 U.S.C. 441a(a)) in addition to the coordinated expenditures authorized by 2 U.S.C. 441a(d). See, *e.g.*, 11 C.F.R. 109.32(a)(3) and (b)(4); *Colorado II*, 533 U.S. at 455 n.16.

expenditure limits applicable to political parties under 2 U.S.C. 441a(d); or (2) to abide by the $5000 limit on contributions and coordinated expenditures applicable to all other multicandidate political committees, while retaining the right to make unlimited independent expenditures in support of that candidate. For purposes of Section 213, all national and state committees of a particular political party "shall be considered to be a single political committee." BCRA § 213(2) (adding FECA § 315(d)(4)(B)).

d. BCRA §§ 304 and 319 are known collectively as the "millionaire provisions." Those provisions allow a congressional candidate to accept contributions in excess of the generally applicable FECA limits under specified circumstances when his opponent expends substantial personal funds on the opponent's own campaign. See BCRA § 304(a)(2) (Senate); BCRA § 319(a) (House of Representatives); Supp. App. 211sa-212sa, 475sa-476sa (Henderson).

e. BCRA § 311 imposes additional requirements concerning the identification of sponsors of election-related advertisements, and makes the sponsorship-identification requirements applicable to "electioneering communications" as defined in BCRA § 201. See Supp. App. 157sa-158sa (per curiam).

f. BCRA § 318 prohibits individuals who are less than 18 years old from making contributions to federal candidates or to political party committees. See Supp. App. 74sa-75sa (per curiam).

g. BCRA §§ 305 and 504 amend Section 315 of the Communications Act of 1934, 47 U.S.C. 315. The Communications Act requires stations to sell broadcast time to a candidate at the "lowest unit charge" during the 45-day period before a federal primary election or the 60-day period before a federal general election. 47 U.S.C. 315(b)(1). Under BCRA § 305, a candidate is entitled to the "lowest unit charge" only if he satisfies one of two requirements. First,

the candidate may certify in writing that neither he nor any authorized committee will make any "direct reference to another candidate for the same office" during the broadcast advertisement. BCRA § 305(a)(3) (adding 47 U.S.C. 315(b)(2)(A)). Alternatively, the candidate can retain his entitlement to the lowest unit charge without making such a promise if he identifies himself in a specified manner at the end of the advertisement and states that he approves of the broadcast. BCRA § 305(a)(3) (adding 47 U.S.C. 315(b)(2)(C) and (D)); see Supp. App. 73sa (per curiam).

BCRA § 504 requires a broadcast station to maintain and make publicly available a complete record of requests to purchase broadcast time "made by or on behalf of a legally qualified candidate for public office" or to broadcast a "message relating to any political matter of national importance," including "a legally qualified candidate," "any election to Federal office," or "a national legislative issue of public importance." BCRA § 504 (adding 47 U.S.C. 315(e)(1)). The record created by the licensee must include "the name of the person purchasing the time, the name, address, and phone number of a contact person for such person, and a list of the chief executive officers or members of the executive committee or of the board of directors of such person." BCRA § 504 (adding 47 U.S.C. 315(e)(2)).

h. BCRA § 401 is a severability provision stating that the invalidation of any BCRA provision, or of any application of the statute, shall not affect the validity of the remainder of the Act. BCRA § 403(a) provides that suits challenging the constitutionality of the Act will be heard by a three-judge district court in the District of Columbia, and that the final decision in any such suit will be reviewable by appeal to this Court. BCRA § 403(b) authorizes any Member of Congress to intervene in any suit in which the constitutionality of the Act is called into question, and BCRA § 403(c) authorizes

Members of Congress to file suit to challenge the constitutionality of the Act.

5. Pursuant to BCRA § 403(a), a variety of individuals, party committees, interest groups, and others filed 11 separate lawsuits, alleging that BCRA on its face violates the First, Fifth, and Tenth Amendments to the Constitution. The FEC, the individual FEC Commissioners, the Federal Communications Commission (FCC), the Department of Justice, and the Attorney General were named as defendants. The United States intervened as a defendant to defend the constitutionality of BCRA. The principal sponsors of BCRA also were granted leave to intervene as defendants pursuant to BCRA § 403(b). After expedited discovery and briefing, the three-judge district court upheld some provisions of the statute; invalidated other BCRA provisions and enjoined their enforcement and application; and found that some of the constitutional challenges were not justiciable in these suits. See Supp. App. 4sa-15sa (per curiam) (summarizing the district court's disposition of the various constitutional challenges); 02-1676 J.S. 16-20 (same).

SUMMARY OF ARGUMENT

A. Title I and Section 213 of BCRA are constitutional.

1. Both in campaign-finance legislation and in a broad range of other laws, Congress has limited the flow of money to federal officers in order to safeguard the integrity of government operations. Because federal elected officeholders are inextricably linked to their political parties, Congress reasonably concluded that large donations to party committees pose a threat of corruption similar to that created by large donations to candidates.

2. Title I's effort to close the soft-money loophole by subjecting all donations to national parties to source-and-amount limitations is consistent with the First Amendment. Limits on contributions are subject to relatively relaxed

constitutional scrutiny. Congress's concern that such donations could result in actual or apparent corruption of office-holders is reasonable on its face. It is also supported by abundant record evidence that describes a systemic exchange of large soft-money donations for access to federal office-holders, through arrangements brokered by the parties. In light of the national parties' demonstrated ability to raise large sums of *hard* money, there is no meaningful danger that the soft-money ban will prevent effective advocacy.

3. Congress validly required that state party committees comply with applicable federal limits when the state parties finance "Federal election activity" as defined in BCRA. Because each category of "Federal election activity" involves conduct that by its nature will affect federal elections, large donations used for such activities substantially assist federal candidates and thus directly implicate the federal government's interest in preventing actual or apparent corruption. The fact that such activities will often affect state elections as well does not diminish the federal interest involved. The financing of such activities has long been subject to federal regulation; BCRA simply (and validly) requires that *all* (rather than an allocable portion) of their costs be paid with hard money.

4. Title I's solicitation restrictions validly serve to prevent party committees and federal office-holders and candidates from using surrogate recipients as a means to circumvent other FECA/BCRA contribution limits. Both in the campaign-finance context and elsewhere, restrictions on an entity's freedom to solicit payments to a third party are frequently used to prevent circumvention of limits on that entity's ability to receive such payments directly.

5. Title I validly prohibits state candidates from spending soft money for a communication that "promotes" or "attacks" a clearly identified federal candidate. That ban

helps to prevent circumvention of the FECA/BCRA contribution limits, and it does not impose any onerous burden on state candidates and office-holders.

6. BCRA § 213 validly requires political parties, with respect to each nominated federal candidate, to forgo either independent expenditures in support of that candidate or the increased coordinated expenditures that parties alone are allowed to make. Congress might constitutionally have compelled the parties to utilize the second alternative, thereby subjecting them to the same legal regime that applies to all other political committees. Congress's decision to give political parties an additional option creates no constitutional infirmity.

B. The electioneering-communications provisions of Title II of BCRA are constitutional.

1. This Court has repeatedly affirmed Congress's judgment that the unique legal and economic attributes of corporations and labor unions warrant regulation of political spending by corporations and unions that would not be permitted as to individuals or unincorporated groups. Because corporations and unions may amass wealth that does not necessarily reflect the popularity of their political views, federal law (2 U.S.C. 441b) has long prohibited them from using general treasury funds to make contributions or independent expenditures in connection with federal elections, and instead requires them to engage in such political activity through a separate segregated fund.

Section 441b's general prohibition on the direct funding of corporate and union political activity is of well-established constitutional validity and has been interpreted by this Court to apply to the financing of advertisements that contain express advocacy—*e.g.*, "Vote for Smith." Title II of BCRA adjusts that longstanding prohibition to apply it to the corporate or union funding of candidate-centered advertisements—defined as "electioneering communications"

(BCRA § 201)—which have escaped regulation because they avoid express advocacy, but nonetheless clearly identify candidates and in all likelihood have the same influence on federal candidate elections as advertisements containing express advocacy. In the past eight years, corporations and unions have poured hundreds of millions of dollars in general treasury funds into federal candidate elections in the form of such "electioneering communications."

2. Title II's source-of-funding limitation on "electioneering communications" is narrowly tailored to serve several compelling government interests. BCRA's primary definition of "electioneering communications" is not only clear and objective, but is supported by empirical evidence showing that advertisements that clearly identify federal candidates and are broadcast shortly before an election to the candidate's own electorate are highly likely to influence electoral outcomes. The objective factors identified by Congress in BCRA § 201 will pose little or no obstacle to entities that are interested in financing "genuine" issue advertisements, but are carefully calibrated to capture so-called "sham" issue advertisements. Preventing the influx of general treasury funds to finance electioneering communications directly advances compelling government interests in eliminating real and apparent corruption in connection with federal elections, as well as in preventing circumvention of the longstanding federal policy embodied in 2 U.S.C. 441b.

3. Neither plaintiffs nor the district court has identified any reason to invalidate Title II's electioneering-communications provisions. In particular, plaintiffs' reliance on the overbreadth doctrine is fundamentally misplaced. The conclusion that Title II meets the narrow-tailoring requirement of strict scrutiny forecloses any finding that the statute is unconstitutionally overbroad. Moreover, because Title II of BCRA does not ban any speech whatsoever, but instead merely places a restriction on the manner in which corporations or unions may *finance* certain speech, the Act does not create the sort of "chill" that this Court has held sufficient to call for the extraordinary step of invalidating a statute on its face. In any event, plaintiffs' attempt to manufacture overbreadth from a few anecdotal examples that they have culled from the massive record in this case does not begin to establish the sort of *substantial* overbreadth required by this Court's precedents. To the contrary, the best examples plaintiffs themselves could find only confirm the wisdom of the objective factors identified in BCRA § 201.

4. Title II's disclosure requirements with respect to electioneering communications are valid. This Court has upheld FECA's disclosure requirements concerning campaign expenditures, recognizing that such provisions prevent real or apparent corruption by exposing significant campaign spending to the light of day and assist the electorate in making predictions about candidates' future performance in office. The disclosure provisions of Title II simply update the similar requirements under FECA that have long applied to the funding of express advocacy.

5. The district court correctly dismissed plaintiffs' challenges to BCRA § 214(a)-(c). BCRA § 214(a) validly applies the same standard that has long governed spending coordinated with federal candidates to spending undertaken in cooperation with political parties. BCRA § 214(b) and (c) imposes no substantive obligation on plaintiffs, but simply directs the FEC to promulgate regulations that are themselves subject to judicial review. In and of itself, BCRA § 214(b) and (c) causes plaintiffs no injury, and it therefore is not subject to challenge in this lawsuit.

C. Plaintiffs' challenges to Titles III and V of BCRA should be rejected.

1. Plaintiffs lack standing to challenge BCRA §§ 304, 307, and 319, which increase the applicable limits on individual

contributions to federal candidates. Plaintiffs themselves are entitled to give and receive contributions in the increased amounts. The competitive injury they claim is much too speculative to support standing and is not fairly traceable to BCRA or to any action of the defendant. In any event, plaintiffs' equal protection claim lacks merit: Congress was under no constitutional obligation to enact contribution limits at all, and it has broad latitude to define and adjust the applicable ceilings.

2. Plaintiffs also lack standing to challenge BCRA § 305, which establishes specific sponsorship-identification requirements for broadcast advertisements that directly refer to an opposing candidate, if the sponsoring candidate asserts his statutory entitlement to the "lowest unit charge" for broadcast time. Because the "lowest unit charge" is available only during specific periods immediately preceding an election, and Senator McConnell's current term does not expire until the year 2008, BCRA § 305 has no actual or imminent impact on any plaintiff's communicative activities. In any event, BCRA § 305 is constitutional. The FCC has long required that the sponsor of *every* broadcast advertisement be identified in the advertisement itself. BCRA § 305 simply provides for identification of the relevant sponsor in an especially clear and unmistakable manner.

3. BCRA § 504, which requires broadcast stations to maintain and keep publicly available records of requests to purchase broadcast time for certain categories of political advertising, is constitutional. BCRA § 504 largely codifies longstanding and unchallenged regulatory requirements imposed by the FCC.

4. BCRA § 318's prohibition on contributions by minors to federal candidates and political parties is a constitutionally valid means of preventing circumvention of the FECA/BCRA contribution limits by adults who might otherwise use minors as surrogate contributors.

ARGUMENT

Contrary to plaintiffs' characterizations, BCRA represents a refinement of pre-existing campaign-finance rules. It is an effort to prevent circumvention of the established statutory scheme, rather than a repudiation of the prior legal regime. In particular, BCRA brings two of the most notorious efforts to circumvent pre-existing law—unregulated soft-money donations to political parties and unregulated election-related advertisements paid for out of corporate and union treasuries—within the regulatory regime and makes related adjustments to the law's disclosure requirements and source-and-amount limitations. Congress has the undoubted power and responsibility to safeguard the integrity of federal elections and to prevent actual or apparent corruption of federal office-holders. Its past efforts to achieve those objectives include a variety of restrictions, previously upheld by this Court, on the financing of federal electoral campaigns. As with other anti-corruption and conflict-of-interest rules whose validity is unquestioned here, Congress in enacting prior campaign-finance laws has sought to prevent monied—and especially corporate—interests from exercising undue influence on the judgment of federal office-holders and on the outcome of federal elections.

As central participants in the federal campaign system, Members of Congress are particularly well-positioned to assess both the inadequacies of existing campaign-finance legislation and the likely efficacy and practicality of alternative proposed solutions. In drafting and enacting BCRA, Congress remained faithful to the core principles that have underlain prior campaign-finance laws, while adapting the statutory regime in light of newly emerging threats to the integrity of federal elections and office-holders. That "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step, * * *

warrants considerable deference" from this Court. *NRWC*, 459 U.S. at 209 (internal quotation marks omitted). And the adjustments challenged in these cases comport with the principles established by this Court's campaign-finance jurisprudence. The challenged provisions of BCRA should be sustained.

1. TITLE I AND SECTION 213 OF BCRA ARE CONSTITUTIONAL

A. The Restrictions On Political Party Fundraising Imposed By Title I Are Consistent With Other Anti-Corruption And Conflict-Of-Interest Provisions Designed To Protect The Integrity Of Federal Office-Holders And Employees

1. "The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized." *NRWC*, 459 U.S. at 210. As the Court held in *Buckley*, see 424 U.S. at 26-29, limits on contributions to candidates for elective office are a constitutionally permissible means of pursuing that objective. To address "the broader threat from politicians too compliant with the wishes of large contributors," *Shrink Missouri*, 528 U.S. at 389, Congress may prohibit donors from transmitting, and candidates from accepting, infusions of money above a statutory threshold.

Limits on campaign contributions, however, are simply one means by which Congress has addressed the danger that federal officers, in performing their governmental duties, might be tempted to favor their financial benefactors or otherwise to advance their own pecuniary interests at the expense of the public good. Federal law also contains "an intricate web of regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials." *United States* v. *Sun-Diamond Growers*, 526 U.S. 398, 409 (1999). Thus, a federal

official is subject to criminal penalties if he solicits or accepts a bribe or illegal gratuity, see 18 U.S.C. 201(b) and (c), *Sun-Diamond*, 526 U.S. at 404; participates in his official capacity in a matter in which he has a personal financial interest, see 18 U.S.C. 208, *United States* v. *Mississippi Valley Co.*, 364 U.S. 520, 548-549 (1961) (discussing predecessor statute); or receives a supplementation of salary from any source outside the United States government, see 18 U.S.C. 209, *Crandon* v. *United States*, 494 U.S. 152, 158-166 (1990). Officers and employees within all three Branches of government are barred, subject to limited exceptions, from soliciting or accepting anything of value from any person "whose interests may be substantially affected by the performance or non-performance of the individual's official duties." 5 U.S.C. 7353(a)(2). Executive Branch employees are further barred, again subject to limited exceptions, from soliciting or accepting any gift "[g]iven because of the employee's official position." 5 C.F.R. 2635.202(a)(2).

As the Court explained in *Crandon*, such restrictions serve to prevent actual and apparent corruption of the federal workforce and to ensure that federal officers and employees bear undivided loyalty to their public employer:

> First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers.

Crandon, 494 U.S. at 165. The anti-corruption rationale for limits on contributions to candidates for public office, accepted by this Court in *Buckley* and its progeny, thus closely resembles the long-accepted bases for more sweeping

restrictions on the receipt by public officials of payments and gifts from persons outside the government. See *Shrink Missouri*, 528 U.S. at 390.

Thus, while the Federal Elections Clause (U.S. Const. Art. I, § 4, Cl. 1) provides a fully sufficient constitutional basis for the statutory provisions at issue in this case, cf. *Buckley*, 424 U.S. at 13, it is not the only source of Congress's power to act in this sphere. Congress possesses in addition a more general power to superintend and protect the integrity of the federal work force. As Justice Black explained, "inherent in the very concept of a supreme national government with national officers is a residual power in Congress to insure that those officers represent their national constituency as responsively as possible. This power arises from the nature of our constitutional system of government and from the Necessary and Proper Clause." *Oregon* v. *Mitchell*, 400 U.S. 112, 124 n.7 (1970) (opinion of Black, J.). Congress has undoubted authority, for example, to prohibit the payment of bribes even to *unelected* federal officers and employees.

The extensive network of laws described above also makes clear that the FECA/BCRA limits on federal campaign contributions do not represent an exception to some general rule that persons outside the government are free to use transfers of money to express approval of official conduct or to associate with public officers. No one (to our knowledge) contends that 18 U.S.C. 201(c)(1)(A), which prohibits the transfer of anything of value to a federal official "for or because of any official act," unconstitutionally impairs the expressive or associational rights of either the donor or the donee. Outside the context of electoral campaign contributions, it is uncontroversial that persons who wish to register their approval of official actions must employ modes of expression other than the transfer of money to federal personnel. The existing FECA/BCRA regime thus is not a

unique constraint on the use of money in support of political objectives, but instead represents a pragmatic effort to achieve the same objectives that underlie federal anti-corruption and conflict-of-interest laws, while allowing federal candidates to obtain the funds needed to wage vigorous electoral campaigns.

Although FECA restricts the amounts that an individual or association may contribute to a candidate for federal office, the applicable contribution limits far exceed the (essentially *de minimis*) value of the gifts that federal officials are otherwise permitted to receive. Compare, *e.g.*, BCRA § 307(a)(1) (individual may contribute up to $2000 per election to federal candidate's campaign) with Senate Rule 35.1(a)(2) and (c)(4), S. Doc. 107-1, at 58-59 (2002) (Senator may not accept gifts from a single source worth $100 or more during a calendar year if gifts are given because of the Senator's official position). With respect to candidates, therefore, there is no "soft money"—all contributions are subject to FECA's source-and-amount restrictions. Moreover, in order to reduce the corruptive potential of campaign contributions, federal law prohibits the diversion of such funds to the candidate's personal use. See BCRA § 301 (amending FECA § 313(b)(1)). By allowing donors to give money specifically earmarked for campaign-related purposes, in amounts that are limited but that may substantially exceed the value of gifts that could permissibly be made on account of the individual's official status, Congress has sought to minimize the risk of actual or apparent corruption while ensuring that candidates for elective office are able to "amass the resources necessary for effective advocacy." *Shrink Missouri*, 528 U.S. at 397 (brackets and internal quotation marks omitted) (quoting *Buckley*, 424 U.S. at 21).

2. Federal limits on contributions to political party committees reflect a similar balancing of interests. Just as an elected official might be tempted to favor the interests of

persons who have given (or might be expected to give) large sums to his own campaign, he might also be tempted to favor the interests of donors who have made substantial contributions to his political party, especially when direct contributions to candidates are capped.[12] In part that is true because party committees frequently seek to influence particular federal elections, and the parties' spending decisions are often responsive to the wishes of large-scale donors. As this Court recognized in *Colorado II*, parties frequently "act as agents for spending on behalf of those who seek to produce obligated officeholders," 533 U.S. at 452, when "[d]onors give to the party with the tacit understanding that the favored candidate will benefit," *id.* at 458. When a federal officeholder has cause to believe that a contribution to the party has been or will be used for spending that directly furthers his own electoral prospects, he is particularly likely to regard it as functionally comparable to a contribution to his own campaign.

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[12] Contrary to the McConnell plaintiffs' contention (Br. 23), the validity of the challenged BCRA provisions does not depend on the premise that a donation to a party committee "is just as corrupting of a candidate as a contribution directly to the candidate." BCRA clearly does not equate the two types of donations, since it allows contributions to national and state party committees in amounts much larger than the applicable limits on contributions to candidates. Compare BCRA §§ 102(3), 307(a)(2) (annual limit of $10,000 on contributions to state party committee and $25,000 on contributions to national party committee) with BCRA § 307(a)(1) (limit of $2000 per election on contributions to federal candidate). BCRA *does* reflect a congressional judgment that donations to parties in amounts above the statutory thresholds may ultimately skew the judgment of federal office-holders in essentially the same way as exorbitant contributions to candidates. Once the validity of *some* cap on donations to party committees is accepted, Congress has considerable latitude to determine appropriate dollar limits, see *Buckley*, 424 U.S. at 30, at least so long as the limits do not deprive the parties of the resources needed for effective advocacy, see *Shrink Missouri*, 528 U.S. at 397; pp. 43-44, *infra*.

Even when that sort of direct and specific benefit is absent, however, a Member of Congress can be expected to feel a natural temptation to favor those persons who have helped the "team," especially when those persons have also made contributions to the individual "team member" up to the legal limits. A variety of factors contribute to the close identification between candidate and party. A candidate for federal office typically runs on a party ticket and is customarily identified by party affiliation. Indeed, under FECA, the distinguishing feature of a "political party" is that it "nominates a candidate for election to any Federal office whose name appears on the election ballot as the candidate of such association, committee, or organization." 2 U.S.C. 431(16).

The close connection between the party and its member legislators extends beyond the electoral process. "Once elected to legislative office, public officials enter an environment in which political parties-in-government control the resources crucial to subsequent electoral success and legislative power." D. Green Expert Report 7. Each House of Congress is organized along party lines, and an individual Member's stature and responsibilities will vary dramatically depending on whether his party is in the majority or in the minority. See, *e.g.*, *id.* at 8 ("Power within each committee and subcommittee [of Congress] is distributed according to political party, with the majority party enjoying special procedural prerogatives and staffing resources."). Party officials both inside and outside Congress will naturally seek to cultivate an attitude that each party member has an important stake in the success of the larger organization. A Member's prospects of obtaining reelection may be significantly affected by the willingness of party leaders to offer their support, as well as by public perceptions of the party with which the Member is associated. See *id.* at 9; Krasno & Sorauf Expert Report 23. It was thus wholly reasonable for

Congress to conclude that a Member of Congress is likely to look favorably upon his party's large-scale benefactors, and that substantial contributions to the party will therefore create risks of "undue influence on an officeholder's judgment, and the appearance of such influence," *Colorado II*, 533 U.S. at 441, similar to those posed by a sizeable contribution to the candidate himself.[13]

B. The Provisions Of Title I And Section 213 Of BCRA Are Consistent With The First Amendment

1. **The ban on receipt of soft money by national party committees complies with the First Amendment:** New FECA § 323(a)(1) (added by BCRA § 101(a)) prohibits any national committee of a political party from receiving funds that are not subject to the FECA contribution limits. The effect of that provision is to close loopholes in the regulation of donations to political parties by barring national party committees from receiving any donations whatever of corporate and union general treasury funds, and by limiting individual donations to the national committees to an annual maximum of $25,000 (see note 7, *supra*). Those restrictions

[13] Other federal anti-corruption and conflict-of-interest laws operate on the premise that payments made to a surrogate may have the same corruptive effect as payments made directly to a federal official. Thus, 18 U.S.C. 201, which proscribes the payment and receipt of bribes and illegal gratuities, encompasses payments made to a third party designated by the relevant federal official, so long as the requisite connection between the payment and official action is present. See 18 U.S.C. 201(b)(1)-(4). Federal ethics regulations likewise provide that the "gift[s]" subject to the regulatory restrictions include gifts "[g]iven to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee." 5 C.F.R. 2635.203(f)(2). Senate Rule 35.1(b)(2)(A) is to the same effect. The evident premise of all those prohibitions is that a federal officer or employee will feel a natural affinity of interests with an organization with which he is closely affiliated, whether or not he has a personal financial stake in the organization's success.

easily satisfy the relatively relaxed standard of review applicable to contribution limits.

a. New FECA § 323(a)(1) places no restrictions either on the total amount of money that a national committee may spend, or on the uses to which lawfully-acquired funds may be put. It functions solely as a source-and-amount limit analogous to (though much larger than) the limits that FECA imposes on contributions to federal candidates and to non-party political committees. Since this Court's decision in *Buckley*, "restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression." *Beaumont*, 123 S. Ct. at 2210.

In *Buckley* itself, this Court upheld FECA's $25,000 annual limit on an individual's aggregate contributions to all federal candidates and political committees, including national parties, characterizing that provision as a "quite modest restraint upon protected political activity" and as "no more than a corollary of the basic individual contribution limitation." 424 U.S. at 38. The Court did not suggest that limits on contributions to parties or other political committees are subject to more searching review than limits on contributions to candidates. As the Court in *Beaumont* explained, contribution limits are subject to a relaxed standard of review because, "[w]hile contributions may result in political expression if spent by a candidate or an association, the transformation of contributions into political debate involves speech by someone other than the contributor." 123 S. Ct. at 2210 (ellipsis omitted) (quoting *Buckley*, 424 U.S. at 21). That observation is as applicable to contributions to party committees as to contributions to candidates—indeed, the Court's reference to "contributions * * * spent by a candidate or an association" (*ibid.*) unambiguously encompasses both categories of contributions.

Similarly, the Court in *Buckley*, in distinguishing between contribution and expenditure limits for purposes of First Amendment analysis, referred repeatedly to limits on contributions to candidates *or* political associations. See 424 U.S. at 20-22. And unlike the expenditure caps struck down in *Buckley*, see *id.* at 39-58—which limited the total amounts that candidates and others could spend on electoral activity, without regard to the size of the increments in which the relevant funds were raised—the effect of the national party soft-money ban "is merely to require [national party committees] to raise funds from a greater number of persons." *Id.* at 22. There is consequently no basis for plaintiffs' suggestions that new FECA § 323(a)(1)'s ban on soft-money donations to national party committees is subject to strict scrutiny.

b. The closing of the soft-money loophole is reasonably designed to prevent actual and apparent corruption of federal office-holders and is therefore consistent with the First Amendment. "The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Shrink Missouri*, 528 U.S. at 391. The premise on which new FECA § 323(a)(1)'s soft-money prohibition is based—i.e., that a federal office-holder may be tempted to favor the interests of those who have donated large sums of money to an organization of which the office-holder is an integral part, and that will have a significant impact on his efforts to win reelection—is "neither novel nor implausible." *Ibid.* In upholding FECA's $25,000 annual ceiling on an individual's aggregate contributions, the *Buckley* Court observed that, absent such a limit, a donor could circumvent the $1000 cap on contributions to a federal candidate by making "huge contributions to the candidate's political party." 424 U.S. at 38. And, in light of the close connections between federal office-holders and the parties

with which they are affiliated, and the degree to which the candidate's fortunes are intertwined with those of the larger party organization, the concern that some federal office-holders may be unduly protective of the interests of their parties' large-scale donors is an entirely plausible one. See pp. 31-34, *supra*.

Presumably for these reasons, plaintiffs do not take issue with the basic pre-existing $20,000 limit on contributions to national parties (increased to $25,000 by BCRA § 307(a)(2)), but only challenge its extension to all donations made to national parties, regardless of their ostensible purpose. The premise of the underlying contribution limit, however, is that large contributions to the parties may ultimately influence the official conduct of party members within the government. Once the validity of that premise is conceded, Congress is entitled to considerable deference in deciding whether donations ostensibly made for non-federal purposes should be exempted from the limits, or whether those donations also create an unacceptable risk of actual or apparent corruption of office-holders.

c. The reasonableness of Congress's judgment regarding the potential corruptive effects of soft-money donations to the national parties is confirmed by the record in this case. Cf. *Colorado II*, 533 U.S. at 458 ("What a realist would expect to occur has occurred."). Judge Kollar-Kotelly aptly described that record as "a treasure trove of testimony from Members of Congress, individual and corporate donors, and lobbyists, as well as documentary evidence, establishing that contributions, especially large nonfederal donations, are given with the expectation they will provide the donor with access to influence federal officials, that this expectation is fostered by the national parties, and that this expectation is often realized." Supp. App. 589sa. Former Senator Warren Rudman testified that "[l]arge soft money contributions in fact distort the legislative process" because "[t]hey affect

whom Senators and House members see, whom they spend their time with, what input they get, and—make no mistake about it—this money affects outcomes as well." *Id.* at 595sa. One lobbyist testified that "[t]he amount of influence that a lobbyist has is often directly correlated to the amount of money that he or she and his or her clients infuse into the political system." *Id.* at 594sa. A corporate CEO who had previously worked for many years as a political fundraiser and consultant (see *id.* at 550sa) testified that "many members of the business community recognize that if they want to influence what happens in Washington, they have to play the soft money game." *Id.* at 598sa; see *id.* at 1265sa-1284sa (Leon) (discussing evidence of links between soft-money donations and increased access to federal office-holders).

Perhaps the most telling evidence that donors view large soft-money donations as a means to affect the legislative process is the fact that in both 1996 and 2000, well over half of the 50 largest soft-money donors gave money to *both* of the major political parties. See Supp. App. 619sa-623sa (Kollar-Kotelly); *id.* at 1284sa-1286sa (Leon); see also *Colorado II*, 533 U.S. at 451 (noting that "many PACs naturally express their narrow interests by contributing to both parties during the same electoral cycle"). That pattern of giving belies an ideological motivation and is explicable instead as an effort to obtain influence within the legislative process. As former Senator Dale Bumpers testified, "[g]iving soft money to both parties, the Republicans and the Democrats, makes no sense at all unless the donor feels that he or she is buying access." Supp. App. 621sa (Kollar-Kotelly); see D. Green Expert Report 26 (stating, with respect to corporations that have made large soft-money donations to both of the major parties, that "it strains credulity to think that their evenhanded distribution of shareholders' money to both parties grows out of their desire to foster democratic discourse").

The examples described above are simply illustrative. A voluminous body of record evidence in this case describes donors' use of large soft-money donations to obtain access to federal office-holders and thereby attempt to affect legislative outcomes.[14] That evidence is exhaustively catalogued in Judge Kollar-Kotelly's opinion (see Supp. App. 567sa-626sa) and dwarfs the evidence of corruption that the Court in *Buckley* (see 424 U.S. at 27 & n.28) and *Shrink Missouri* (see 528 U.S. at 393-394) found sufficient in upholding the contribution limits at issue in those cases.[15]

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[14] The record also contains abundant evidence that large soft-money donations to political parties have created an appearance of corruption in the eyes of the electorate. See Supp. App. 626sa-636sa (Kollar-Kotelly); *id.* at 1289sa-1296sa (Leon). This Court has made clear that the interest in preventing the appearance of corruption, and thereby fostering public confidence in the operations of the government, is a constitutionally sufficient basis for limits on campaign contributions. See *Shrink Missouri*, 528 U.S. at 390, 393-394; *Buckley*, 424 U.S. at 27, 30. The Court has recognized the importance of that interest in other contexts as well. The Court has explained, for example, that conflict-of-interest laws governing federal personnel are "directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *Mississippi Valley Co.*, 364 U.S. at 562; see *Crandon*, 494 U.S. at 164-165 (identifying public perception of corruption as one of the harms caused by private supplementation of government worker's salary); cf. *Civil Serv. Comm'n v. Letter Carriers*, 413 U.S. 548, 565 (1973) (explaining, with regard to Hatch Act restrictions on Executive Branch employees' political activities, that "it is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent").

[15] As the RNC plaintiffs observe (Br. 26), the record does not identify specific instances in which a soft-money donation has demonstrably caused a Member of Congress to alter his vote on a pending legislative proposal. This Court's decisions make clear, however, that the validity of a contribution limit does not depend on evidence of that character. This Court in *Buckley*, citing the opinion of the court of appeals in that case, referred to

The record makes clear not only that donors and federal office-holders perceive a connection between large soft-money donations and influence upon the legislative process, but that the national party committees actively seek to foster that perception. The RNC's own documents "show that the RNC's donor programs offer greater access to federal office holders as the donations grow larger, with the highest level and most personal access offered to the largest soft money donors." Supp. App. 608sa (Kollar-Kotelly); accord *id.* at 1271sa (Leon). The RNC plaintiffs assert (Br. 13) that "RNC reliance on federal officeholders for personal or telephonic solicitation of major donors was 'exceedingly rare.'" Even if federal office-holders seldom undertake the actual solicitation of funds on behalf of the RNC, but see Supp. App. 554sa-555sa (Kollar-Kotelly), the RNC encourages office-holders to meet with the party's large soft-money

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"the deeply disturbing examples surfacing after the 1972 election" as persuasive evidence "that the problem [of corruption] is not an illusory one." 424 U.S. at 27 (citing *Buckley* v. *Valeo*, 519 F.2d 821, 839-840 & nn.36-38 (D.C. Cir. 1975)). The cited portion of the court of appeals' opinion, however, identifies no instance in which a political contribution had been proved to affect the outcome of a Presidential or legislative decision. Rather, the court of appeals described instances in which large contributions (1) were made "in order to gain a meeting with White House officials on [milk] price supports," *Id.* at 839 n.36; (2) "were motivated by the perception that this was necessary as a 'calling card, something that would get us in the door and make our point of view heard,'" *id.* at 839 n.37; or (3) were triggered by a "widespread understanding that such contributions were a means of obtaining the recognition needed to be actively considered" for ambassadorial appointments, *id.* at 840 n.38. Indeed, the court of appeals in *Buckley* stated that it was "not material," for purposes of the constitutional analysis, "whether the President's decision [to increase the price supports] was in fact, or was represented to be, conditioned upon or 'linked' to" the contributions at issue. *Id.* at 839 n.36. This Court's treatment of those examples as an adequate factual predicate for the constitutionality of the FECA contribution limits amply demonstrates that a systemic exchange of large soft-money donations for access to federal office-holders may properly be regarded as a form of corruption.

donors, see *id.* at 603sa-607sa, and it utilizes the prospect of access to office-holders in order to attract soft-money donations, see *id.* at 608sa-609sa. The RNC's use of other individuals to convey the explicit request for funds does not meaningfully reduce the corruptive potential of the larger process by which soft-money donations are obtained. There has never been a requirement that the quid and the quo must both occur in the same telephone call. In addition, Congress in drafting appropriate prophylactic legislation was entitled to guard against the possibility that the RNC might begin to employ on a more systematic basis the same fundraising techniques that other national party committees have utilized.[16]

d. In crafting new FECA § 323(a), Congress chose to close the loophole that allowed unlimited soft-money donations to national party committees for the financing of activities ostensibly intended solely to influence state elections. The decision to regulate all donations to the national parties reflects Congress's judgment that "[b]ecause the national parties operate at the national level, and are inextricably intertwined with federal officeholders and candidates, who raise the money for the national party committees, there is a close connection between the funding of the national parties

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[16] None of the four congressional campaign committees (CCCs) is a party to these cases. See note 8, *supra*. Unlike the Republican and Democratic National Committees, each of the CCCs is headed by a sitting Member of Congress. See Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 Colum. L. Rev. 620, 651 (2000) ("Members of Congress constitute and control the CCCs that play the leading role in providing party money and campaign services to congressional candidates."); Krasno & Sorauf Expert Report 9-10. The CCCs regularly call upon Members of Congress to solicit donations. See Supp. App. 548sa-554sa (Kollar-Kotelly). With respect to those committees, it is particularly clear that "no wall between the national parties and the national government exists." Krasno & Sorauf Expert Report 10. The four CCCs raised a total of $212 million in soft money during the 2000 election cycle. *Id.* at 9.

and the corrupting dangers of soft money on the federal political process." 148 Cong. Rec. H409 (daily ed. Feb. 13, 2002) (statement of Rep. Shays). Congress concluded that "[t]he only effective way to address this problem of corruption is to ban entirely all raising and spending of soft money by the national parties." *Ibid.* In light of Congress's greater familiarity with the nature of party fundraising and its effects on the legislative process, that determination is entitled to substantial judicial deference. It is also supported by extensive record evidence demonstrating that large soft-money donors to the national party committees have been promised and granted access to the parties' federal office-holders, notwithstanding the fact that soft money is (by definition) not permitted to be used in order to influence federal elections. See pp. 37-41, *supra*.

It is wholly understandable, moreover, that an elected federal official will tend to look favorably on his party's large donors, even when a particular donation is earmarked for activities directed solely at state elections. Because money is fungible, a donation that defrays the costs of state electoral advocacy will free up funds for other activities that may directly and tangibly affect federal elections. Cf. *Humanitarian Law Project* v. *Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000), cert. denied, 532 U.S. 904 (2001).[17] Because the

[17] In *California Medical Ass'n* v. *FEC*, 453 U.S. 182 (1981), this Court applied a similar analysis in holding that FECA's $5000 annual limit on contributions to a political committee is constitutional even as applied to contributions earmarked for administrative support of the political committee itself. The California Medical Association (CMA)—the putative donor in that case—argued that contributions so earmarked "lack any potential for corrupting the political process." *Id.* at 199 n.19 (plurality opinion). In rejecting that contention, the plurality explained that "if an individual or association was permitted to fund the entire operation of a political committee, all moneys solicited by that committee could be converted into contributions [to candidates], the use of which might well be dictated by the committee's main supporter." *Ibid.*; see *id.* at 203 (Blackmun, J., concurring in part and concurring in the judgment) (agreeing that statutory limit should be sustained under an anti-circumvention rationale).

decennial redrawing of congressional district lines is typically performed by state legislatures, a party's congressional candidates can expect to benefit if the party obtains a legislative majority within the State. See Supp. App. 531sa-533sa (Kollar-Kotelly); D. Green Expert Report 11-12. A Presidential candidate's likelihood of winning a State's electoral votes may be increased if the State's Governor is a member of the candidate's own political party. And even where such tangible links are not apparent, federal and state candidates within a single party are co-participants in a common enterprise and are encouraged by party leaders to regard each other as such.

Thus, whether or not a particular donation earmarked for state elections has a foreseeable spillover effect on any federal race, a federal office-holder's close identification with his political party may cause him to regard a large-scale party benefactor as an ally of his own. See pp. 31-34, *supra*. That potential is magnified when the soft-money donor has already made hard-money contributions to the candidate and party up to the legal limit. Although soft-money donations may have less tangible benefits to a federal candidate or office-holder because of legal restrictions on how the money may be spent, soft money nevertheless benefits such persons by assisting the organization of which they are integral members. And, in any event, the process by which the funds are raised, in which access to federal office-holders has been systematically exchanged for large soft-money donations, creates a substantial risk of actual or apparent corruption, regardless of how the funds are ultimately spent. See pp. 37-41, *supra*.

e. The closing of the soft-money loophole cannot plausibly be expected to prevent the national parties from "amassing the resources necessary for effective advocacy." *Buckley*, 424 U.S. at 21; see *Shrink Missouri*, 528 U.S. at 397. In the 2000 election cycle, the national parties raised $741 million in *hard money* alone. Supp. App. 491sa-492sa (Kollar-Kotelly). That is some $210 million *more* than the national parties' combined hard- and soft-money receipts as recently as the 1992 election cycle. *Ibid.* The national parties will likely raise even larger sums of hard money under BCRA, both because the limit on individual contributions to national party committees has been increased from $20,000 to $25,000 per year, see BCRA § 307(a)(2), and because the national parties can adapt to the soft-money ban by "rais[ing] funds from a greater number of persons," *Buckley*, 424 U.S. at 22.[18]

[18] The RNC plaintiffs also argue (Br. 64-69) that new FECA § 323(a) violates the First Amendment as applied to minor parties such as plaintiff Libertarian National Committee (LNC). The principal thrust of their constitutional argument is that the LNC uses federal campaigns as fora for issue advocacy, rather than as serious efforts to achieve the election of candidates, and that soft-money donations to the LNC pose no realistic threat of corrupting federal office-holders because "[n]o Libertarian Party candidate has ever won a race for federal office." RNC Br. 67. Having chosen to accept the advantages that flow from official recognition of its candidates on the ballot, however, as well as the various forms of preferential treatment that the FECA/BCRA regime gives to party committees (see p. 71, *infra*), the LNC has no constitutional entitlement to an exemption from the restrictions that apply to other political parties. Plaintiffs' argument logically suggests that the individuals whom it nominates for federal office should also receive a constitutional exemption from the FECA/BCRA limits on contributions to candidates, a proposition that has no support in this Court's precedents. Indeed, this Court in *Buckley* specifically declined to create a blanket exception for minor parties from the FECA limits on contributions to federal candidates, or from the Act's disclosure requirements. See 424 U.S. at 33-35, 72-74.

2. **The restrictions on state parties' use of soft money for "Federal election activity" are reasonable and consistent with the First Amendment:** With respect to state political party committees, Congress employed a somewhat different approach. Congress did not place a federal limit on all donations to the state parties. Rather, BCRA applies the federal source-and-amount restrictions and disclosure requirements (subject to the narrow exception provided by the Levin Amendment, see pp. 49-51, *infra*) only to the funds used for four specified categories of "Federal election activity." See FECA § 323(b)(1) (added by BCRA § 101(a)). That term is defined to include (i) "voter registration activity" within the 120 days before a federal election; (ii) "voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot"; (iii) any "public communication that refers to a clearly identified candidate for Federal office * * * and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office"; and (iv) all services provided by any employee who devotes more than 25% of his compensated time in any month to activities in connection with federal elections. BCRA § 101(b) (adding FECA § 301(20)(A)(i)-(iv)). The requirement that such activities be financed entirely with money raised in compliance with the FECA/BCRA contribution limits is consistent with the First Amendment.

a. Contrary to the RNC plaintiffs' contention (Br. 39), the restrictions imposed by new FECA § 323(b) are properly treated as limits on contributions rather than on expenditures, even though the applicability of those restrictions turns on the use to which the relevant funds are ultimately put. Unlike the expenditure caps that were struck down in *Buckley*, new FECA § 323(b) does not limit the total amount of money that either the donor or the party may spend, either on political advocacy generally or on "Federal election

activity" in particular. Compare *Buckley*, 424 U.S. at 39 (explaining that FECA's prior "expenditure ceilings impose direct and substantial restraints on the quantity of political speech"). Rather, like the contribution limits that the *Buckley* Court sustained, the effect of new FECA § 323(b) "is merely to require * * * [party] committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression." *Id.* at 22. Indeed, Congress placed distinct restrictions on disbursements for "Federal election activity" not in order to impose some overall limit on state party spending, but solely to allow spending for non-federal purposes to remain free from federal regulation. The RNC plaintiffs' argument would have the perverse effect of subjecting Congress's limited regulation of contributions used for defined activities to more demanding constitutional scrutiny than an absolute cap on donations for any purpose.

b. Each category of "Federal election activity" as defined in the Act involves conduct that by its nature will influence federal elections. Disbursements for such activities—particularly disbursements for the activities described in new FECA § 301(20)(A)(i), (ii), and (iv)—will often influence state elections as well. But the potential impact on state elections does not diminish the federal interest in preventing actual or apparent corruption of federal office-holders. If a state party's voter-registration and get-out-the-vote activities in connection with an even-year election are successful, the party's federal candidate(s) will inevitably benefit; and the extent of that benefit does not depend on the number of state offices that are contested at the same election. See D. Green Expert Report 14 (available evidence "shows quite clearly that a campaign that mobilizes residents of a highly

Republican precinct will produce a harvest of votes for Republican candidates for both state and federal offices."). Because federal candidates are likely to regard large donations used to finance "Federal election activity" within their States or districts as substantially assisting their own campaigns, such donations directly implicate the concern that the donor may exercise "undue influence on an officeholder's judgment, and the appearance of such influence." *Colorado II*, 533 U.S. at 441.

Each category of "Federal election activity," moreover, has historically been subject to federal regulation and required to be financed in part with hard money under the FEC's allocation rules. See pp. 8-10, *supra*. The prior allocation regime reflected the FEC's recognition that such activities can be expected to influence federal elections. Plaintiffs' attack on new FECA § 323(b) logically implies that either (1) the prior allocation rules were themselves unconstitutional, or (2) the activities described in new FECA § 301(20)(A)(i)-(iv) have a sufficient impact on federal elections to justify a requirement that *part* of their costs be paid with hard money, but do not have a sufficient impact to support a requirement that *all* of their costs be so financed.

Neither of those theories is persuasive. The evidence in this case amply supports Congress's determination that "Federal election activity" as defined in the Act can be expected to have a significant impact on federal elections. See Supp. App. 516sa-531sa (Kollar-Kotelly). If such activities could be financed entirely with *unlimited* soft-money donations, the party's spending could therefore have the effect of creating indebted federal office-holders, and the other limits on contributions could be effectively circumvented. And once the propriety of *some* restriction on the funding of "Federal election activity" is accepted, "a court has no scalpel to probe" (*Buckley*, 424 U.S. at 30) whether 100% or some lesser portion of the costs of such activities

should be required to be financed with hard money. Based on its Members' extensive experience under the Commission's former allocation rules, Congress determined that greater constraints on state parties' use of soft money were needed to preserve the integrity of federal elections and federal office-holders. The Constitution does not prevent Congress from acting upon that judgment.

The RNC plaintiffs appear to argue that the FEC's prior allocation rules were invalid, and that a party committee has a First Amendment right to receive unlimited contributions for any political activity that does not expressly advocate the election or defeat of a federal candidate. See RNC Br. 54-55, 88 n.50.[19] The Court in *Buckley* declined, however, to impose an "express advocacy" test for organizations "the major purpose of which is the nomination or election of a candidate," because the expenditures of such organizations "are, by definition, campaign related." 424 U.S. at 79; see *id.* at 79-80. Unlike some interest groups, which may have as their primary function issue advocacy rather than the election of candidates, "parties are primarily and continuously concerned with acquiring power through electoral victory. Parties never engage in public communication without regard to its electoral consequences." D. Green Expert Report 17 n.19. There is consequently no need to distinguish between political party disbursements that are directed at candidate elections and those that are not. Rather, the relevant distinction is between disbursements that are directed, in whole or in part, at *federal* elections, and those that are directed at state and/or local elections only (and even that line addresses only who should regulate; it does

[19] The McConnell plaintiffs state (Br. 13) that the FEC's prior allocation rules "reflected an assiduous regard for our federal system." Like the RNC plaintiffs, however, they contend (*id.* at 26 n.5) that Congress lacks power to "regulate expenditures for speech that does not constitute express advocacy."

not demarcate activities that the First Amendment places beyond regulation). Disbursements for "Federal election activity" as defined in BCRA can reliably be assumed to fall within the former category.

c. Consistent with both the First Amendment and principles of federalism, Congress might have categorically required state party committees to finance all "Federal election activity" entirely with funds contributed subject to the FECA/BCRA source-and-amount restrictions and disclosure requirements. Congress chose, however, to establish an exception to that general rule, in order to accommodate the interests of state parties in raising and spending additional funds to influence state elections. Under the "Levin Amendment" (new FECA § 323(b)(2)), state and local party committees may use soft money to finance an allocable share of the costs of certain categories of "Federal election activity," provided that the following conditions are met:

> First, the permitted activities may not refer to a clearly identified federal candidate. Second, those activities may not involve any broadcast communication except one that refers solely to a clearly identified state or local candidate. Third, no single donor may donate more than $10,000 to a state or local party annually for those activities. Finally, all money (federal and Levin money alike) spent on such activities must be "homegrown"—i.e., raised solely by the spending state or local party.

Supp. App. 56sa (per curiam). Without those limitations on the Levin Amendment option, Congress might well have declined to create any exception to the rule that state parties' "Federal election activity" must be financed exclusively with money raised in compliance with the generally applicable federal source-and-amount restrictions. And state parties may avoid the restrictions on the use of Levin

Amendment funds simply by spending hard money to finance the activities described in new FECA § 301(20)(A).

The RNC plaintiffs focus in particular (see Br. 58-61) on the requirement that "homegrown" funds be used, which they characterize as a "ban" on transfers of funds between different units of a political party. RNC Br. 58. That claim is misconceived. The Levin Amendment does not restrict the freedom of party committees to transfer lawfully-acquired funds among themselves. BCRA simply requires that, *if* a state or local party committee seeks to use funds raised outside of FECA's source-and-amount restrictions to defray part of the costs of "Federal election activity," *that activity* must be financed entirely with "homegrown" money. That modest condition on the Levin Amendment option—an option that Congress was not obliged to create, and one that no state or local party committee is required to utilize—creates no meaningful constitutional problem.

Although state and local party committees in raising Levin Amendment funds are not subject to all of FECA's source-and-amount restrictions,[20] the $10,000 limit on Levin Amendment donations reflects Congress's conclusion that the activities in question affect federal elections and that unrestricted donations would therefore threaten actual or apparent corruption of federal office-holders. Absent the requirement that funds used for Levin Amendment activities be "homegrown," a donor could contribute $10,000 to each of several committees participating in the same joint activity, effectively subverting the $10,000 per-donor cap on Levin Amendment donations. And if national party committees could provide the hard money to be spent in allocation with a state or local party's Levin funds, the

[20] Most significantly, Levin Amendment funds may include corporate and union treasury donations, subject to the $10,000 maximum, to the extent that state law permits. See 11 C.F.R. 300.31(c).

national parties "could gain influence over how the account is spent, including the money raised by the less restrictive Levin provisions." D. Green Expert Report 18; cf. note 6, *supra* (explaining that, before the enactment of BCRA, national parties frequently transferred soft money to state parties with instructions as to the manner in which those funds should be used). The national parties would thus effectively regain the ability to direct soft money to activities that will affect federal elections—precisely the abuse that new FECA § 323(a) was designed to prevent.

3. **Title I's solicitation restrictions reinforce Title I's contribution limits and comply with the First Amendment:** Plaintiffs also challenge three distinct restrictions imposed by BCRA § 101(a) on the solicitation of funds by political party officials and by federal office-holders and candidates. First, new FECA § 323(a) prohibits any national political party committee from soliciting soft-money donations to any recipient. Second, new FECA § 323(d) prohibits any national or state party committee from soliciting donations to certain organizations that are exempt from tax under Section 501(c) or Section 527 of the Internal Revenue Code. Third, new FECA § 323(e)(1) generally prohibits federal office-holders and candidates from soliciting donations in connection with either federal or state elections unless those donations comply with FECA's source-and-amount restrictions. Those provisions are valid anti-circumvention measures that are fully consistent with the First Amendment.

a. The McConnell plaintiffs contend that the challenged solicitation restrictions are subject to strict scrutiny. McConnell Br. 17-18 (citing *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 795-796 (1988)). They are mistaken. In *Riley*, the Court applied strict scrutiny only in reviewing a state-law provision that directly regulated the *content* of the fundraiser's message, by compelling disclosure of information concerning the percentage of gross receipts that were

actually passed on to charities. *Riley*, 487 U.S. at 786, 795. The Court explained that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech." *Id.* at 795. The provisions at issue here, by contrast, are directed not at the content of the fundraising appeal, but at the identity of the fundraiser. They are in the nature of conflict-of-interest regulations and serve to prevent individuals who have acquired power or influence in one capacity from utilizing it in service of another entity, in circumstances where corruption of federal office-holders may result. Though such restrictions are not immune from First Amendment challenge, this Court's decisions do not suggest that they are subject to strict scrutiny.

To the contrary, this Court has subjected solicitation restrictions designed to reinforce and prevent the circumvention of the FECA contribution limits to the same complaisant scrutiny applied to the contribution limits themselves. In *NRWC*, this Court held that a nonprofit corporation could constitutionally be prohibited from soliciting contributions to its federal PAC from individuals who were not its actual "members." See 459 U.S. at 201-211. The Court did not apply strict scrutiny, but instead emphasized the need for deference to congressional judgments in this area, stating that it would not "second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared." *Id.* at 210; see also *Beaumont*, 123 S. Ct. at 2207-2209 (noting the close interrelationship between the solicitation restrictions at issue in *NRWC* and the underlying contribution limits expressly upheld in *Beaumont*). A similarly deferential review is appropriate here.

b. New FECA § 323(a)'s ban on soft-money solicitations by national political party committees is based on the reasonable premise that, if a large donation to the national party has sufficient corruptive potential to justify a ban, a similar donation to an associated entity (*e.g.*, a state party committee or candidate for state office) designated by the national party may create a comparable threat of corruption.[21] That risk is particularly acute in light of the close connections between national and state party committees and candidates within the party, which increase the danger that a large soft-money donation solicited by a national party committee will be perceived—by the donor, the national party, and federal office-holders—as the functional equivalent of a donation to the national party committee itself. Congress properly acted to prevent the use of such solicitations as a means of circumventing the statutory ban on donations of soft money directly to the national parties.

Insofar as new FECA § 323(a) prohibits a national party committee from soliciting for others donations that the committee itself could not lawfully receive, it is in no way anomalous. To the contrary, similar prohibitions are a characteristic feature of federal anti-corruption and conflict-of-interest laws. See, *e.g.*, 5 C.F.R. 2635.203(f)(2) (providing that regulatory restrictions on gifts to federal employees encompass gifts "[g]iven to any other person, including any charitable organization, on the basis of designation, recommendation, or other specification by the employee"); note 13,

[21] We do not understand plaintiffs to challenge new FECA § 323(a)'s ban on soft-money solicitations by national party committees insofar as that ban applies to solicitations for the national party itself. New FECA § 323(a) categorically prohibits national party committees from *receiving* soft-money donations, and neither the party nor its officials can claim any First Amendment right to propose an illegal transfer of funds. See *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 388-389 (1973). Rather, we understand plaintiffs to challenge BCRA's solicitation restrictions only as they apply to potential donations (*e.g.*, soft-money donations to state party committees or to state candidates) that are not in themselves illegal.

supra. As those provisions demonstrate, when person A is (for whatever reason) barred from giving money to person B, a natural corollary of that prohibition is to bar B from requesting that A give money to a third party (person C) of B's choosing. That ancillary prohibition raises no meaningful First Amendment concerns, even when a payment from A to C is not unlawful in and of itself.[22]

c. Congress acted constitutionally in barring national and state party committees, and their officials acting on behalf of the parties, from soliciting donations for certain tax-exempt organizations that engage in political activity.[23] New FECA

[22] The RNC plaintiffs assert (Br. 43) that "it is perfectly legal for anyone else to say 'contribute to the Jones for Governor campaign,' but it is a *crime* for a national party official merely to utter *those exact words*." That assertion overstates the practical effect of new FECA § 323(a)'s ban on soft-money solicitation by the national parties. First, that ban applies to national party officials only when they act "on behalf of such a national committee." A national party official therefore remains free to solicit soft money for a state party or state candidate if he acts in a different capacity (*e.g.*, as a state party official, or simply as an individual). See 67 Fed. Reg. 49,083 (2002). Second, a candidate for state office (like anyone else) is free to establish a federal PAC, which can accept contributions subject to FECA's disclosure requirements and source-and-amount limits. Money contributed to that PAC can be used (insofar as federal law is concerned) to finance the state candidate's campaign. Even when acting on behalf of the RNC, a national party official could legally solicit hard-money contributions to that PAC. Third, it is not "perfectly legal for anyone else to say 'contribute to the Jones for Governor campaign.'" To the contrary, federal law validly prohibits a variety of persons from soliciting funds for state electoral campaigns. See, *e.g.*, 5 U.S.C. 7323(a) (federal Executive Branch employees; see pp. 57-58, *infra*); 26 U.S.C. 501(c)(3) (designated nonprofit organizations); *Blount* v. *SEC*, 61 F.3d 938, 947 (D.C. Cir. 1995) (municipal securities professionals, with respect to the campaigns of state officials from whom they obtain or solicit business). Finally, the RNC plaintiffs' argument highlights the restrictions placed on political parties by new FECA § 323(a) while ignoring the special advantages that parties receive—precisely the analytical approach that this Court rejected in *California Med. Ass'n*. See 453 U.S. at 200-201; p. 71, *infra*.

[23] New FECA § 323(d) prohibits the parties from soliciting donations to a Section 501(c) organization "that makes expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)," or to any Section 527 organization "other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office."

§ 323(d) serves to prevent circumvention of the limits on contributions to the parties through the use of nonprofit organizations as surrogate recipients of funds.[24] The national party committees have in the past persuaded "donors to donate nonfederal money to certain interest groups that then use such funds for broadcast issue advertisements and other activities that influence federal elections." Supp. App. 636sa (Kollar-Kotelly); see *id.* at 636sa-642sa; *id.* at 1247sa-1253sa (Leon).

Those donations, if solicited by party committees, will likely be regarded (by donors, party officials, and federal office-holders alike) as benefitting the party itself and its

[24] In addition to prohibiting national and state parties from *soliciting* donations from other persons to the designated tax-exempt organizations, new FECA § 323(d) also provides that the parties themselves shall not "make or direct any donations to" those organizations. The government's expert explained that "[t]he parties' motive for transferring funds to tax-exempt organizations that are engaged in electoral activity is to gain control of these organizations, because doing so gives parties control over the soft money that tax-exempt organizations are free to raise." D. Green Expert Report 17. The ban on party donations to those organizations prevents the parties from leveraging their own assets in that manner. *Id.* at 17-18. And by forcing the party committees to engage in political advocacy in their own names, rather than through surrogates whose links to the parties may not be widely known, the prohibition on party donations to tax-exempt entities assists the public in evaluating communications for which the party is ultimately responsible. Party committees remain free to donate lawfully acquired funds to PACs, which are subject to the disclosure requirements and source-and-amount restrictions imposed by FECA. *Id.* at 18; see new FECA § 323(d)(2) (solicitation ban is inapplicable to any Section 527 organization that is a "political committee"). And, as with the ban on party solicitations for the designated Section 501 and Section 527 organizations, the ban on direct donations may be regarded as simply a reasonable condition on Congress's decision to confer tax-exempt status upon the relevant organization. See note 25, *infra*.

federal candidates; yet they are not subject to FECA's disclosure requirements and source-and-amount restrictions. The tighter restrictions on donations to other likely surrogates, such as the state parties, will only increase the temptation to pursue such arrangements. In the absence of new FECA § 323(d), "the national parties could easily circumvent the new regulatory regime by creating satellite party organizations in the guise of tax-exempt organizations, which would be free to collect donations of unlimited size." D. Green Expert Report 18; cf. *Colorado II*, 533 U.S. at 457 (explaining that substantial record evidence in that case "demonstrates how candidates, donors, and parties test the limits of the current law").[25]

d. New FECA § 323(e)'s restrictions on soft-money solicitations by federal candidates and office-holders are also constitutional. New FECA § 323(e) reflects Congress's reasonable concern that large donations made to other candidates or political committees at the behest of a federal candidate or office-holder may create the same kind of risks of actual or apparent corruption as are posed by large donations to a federal candidate's own campaign. To the extent that it is unclear whether a federal candidate would

[25] New FECA § 323(d) might also be conceived (and sustained) as a reasonable condition imposed by Congress on its decision to grant the relevant Section 501(c) or Section 527 organization an exemption from federal tax. "[T]ax exemptions * * * are a form of subsidy that is administered through the tax system." *Regan* v. *Taxation with Representation*, 461 U.S. 540, 544 (1983). Although Congress's authority to grant and withhold tax exemptions is subject to constitutional limits, see *id.* at 545, "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes," *id.* at 547. New FECA § 323(d) reflects Congress's determination that certain organizations that have requested and received a tax subsidy should not also receive a particular type of fundraising assistance that could potentially be used to circumvent the campaign-finance laws. Especially under the relaxed standard applicable to legislative judgments in this field, that condition on the organization's tax-exempt status easily survives First Amendment review.

view a donation to a particular recipient favorably, that uncertainty is eliminated by the solicitation itself. As one corporate CEO and former political consultant testified, "[m]ost soft money donors don't ask and don't care why" money solicited by a Member of Congress is being directed to a particular recipient; "[w]hat matters is that the donor has done what the Member asked." Supp. App. 550sa-551sa (Kollar-Kotelly). By permitting solicitations for both federal and state elections, subject to FECA's source-and-amount limits, BCRA addresses the threat of actual or perceived corruption while allowing federal office-holders and candidates to play a meaningful role in party fundraising efforts.

Insofar as it subjects federal office-holders and candidates to legal constraints stricter than those imposed upon the general public, new FECA § 323(e) breaks no new ground. This Court has recognized that "the State's interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'" *Connick* v. *Myers*, 461 U.S. 138, 140 (1983) (quoting *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968)).[26] Subject to narrow exceptions not relevant here, the Hatch Act has long prohibited the solicitation of political contributions by federal Executive Branch employees. See 5 U.S.C. 7323(a)(2); see also *Letter Carriers*, *supra*; *Public Workers* v. *Mitchell*, 330 U.S. 75 (1947).[27]

[26] Although new FECA § 323(d) encompasses candidates for federal office who are not (yet) office-holders, its application to such persons serves the same anti-corruption purpose as its application to persons actually holding federal office. If a candidate incurs political debts during the course of a campaign, and subsequently wins election, those debts may be repaid after the candidate takes office. Cf. 18 U.S.C. 201 (federal bribery and anti-gratuity law applies to any "person who has been selected to be a public official" as well as to any "public official").

[27] At the time of this Court's decisions in *Letter Carriers* and *Mitchell*, the Hatch Act more broadly prohibited Executive Branch employees from

Restrictions on the participation of public employees in political fundraising serve in part to insulate the employees themselves from untoward pressure to engage in political activities. See *Letter Carriers*, 413 U.S. at 566. Those restrictions also serve, however, to ensure (i) that public employees are not affected (or perceived to be affected) in the performance of their duties by the fact that persons with business before the government have contributed to a political campaign or have declined to do so, cf. *id.* at 564-565, and (ii) that persons from whom contributions are requested will not feel coerced to contribute by reason of the solicitor's official status. New FECA § 323(e) is a reasonably tailored effort to achieve the same objectives.[28]

4. **New FECA § 323(f)'s restrictions on state candidates and office-holders are valid anti-circumvention measures**: New FECA § 323(f) prohibits state candidates and office-holders from spending soft money "for a communication

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taking an "active part in political management or in political campaigns." See *Letter Carriers*, 413 U.S. at 550; *Mitchell*, 330 U.S. at 78 & n.2. Congress has since relaxed the Hatch Act's restrictions. Under current law, the ban on active participation in political campaigns applies only to a relatively narrow group of Executive Branch employees. See 5 U.S.C. 7323(a), (b)(2) and (3). The ban on participation in political fundraising, however, remains generally applicable. See 5 U.S.C. 7323(a)(2).

[28] Restrictions on a federal candidate's freedom to solicit lawful contributions in connection with his *own* electoral race would raise substantial constitutional questions that are not implicated by the restrictions imposed upon Executive Branch employees by 5 U.S.C. 7323(a)(2). With respect to *other* elections, however, and particularly elections for state office, it is not apparent why a Member of Congress should have a greater First Amendment right to engage in political fundraising than does an Executive Branch employee. Indeed, this Court's decision in *United States* v. *NTEU*, 513 U.S. 454, 472-473 (1995), suggests that Congress may have *greater* power to restrict the off-duty financial activities of the highest-ranking federal officials than to impose similar restrictions on the federal rank-and-file, since high-ranking officials will likely be better positioned to reward past favors through the use of their governmental power.

described in [new FECA] section 301(20)(A)(iii)"—*i.e.*, for a communication that "refers to a clearly identified candidate for Federal office * * * and that promotes or supports a candidate for that office, or attacks or opposes a candidate for that office." BCRA § 101(b) (new FECA § 301(20)(A)(iii)). As Judge Leon correctly explained, that provision "simply guard[s] against * * * conversions of soft money donations to fund communications that are designed to accomplish the federal purpose of directly influencing a federal election." Supp. App. 1146sa; see *id.* at 993sa (Kollar-Kotelly) (endorsing Judge Leon's analysis).

Plaintiffs' attack on new FECA § 323(f) rests largely on overstatements of that provision's practical effects. Thus, the NRLC plaintiffs appear to construe new FECA § 323(f) to encompass virtually every reference a state candidate or office-holder might make to an identified candidate for federal office, even when the evident purpose of the communication is to fulfill a state officer's official duties unrelated to any election, or to further a state candidate's own electoral prospects, rather than to influence a federal election. See NRLC Br. 39-43. As Senator Feingold explained, however, new FECA § 323(f) does not prohibit "spending non-Federal money to run advertisements that mention that [state candidates] have been endorsed by a Federal candidate or say that they identify with a position of a named Federal candidate, so long as those advertisements do not support, attack, promote or oppose the Federal candidate." 148 Cong. Rec. S2143 (daily ed. Mar. 20, 2002). The McConnell plaintiffs contend (Br. 35) that new FECA § 323(f) "is tantamount to an outright ban" on the issuance by state candidates and office-holders of the communications described in new FECA § 301(20)(A)(iii). Contrary to those plaintiffs' suggestion (Br. 35), however, nothing in federal law prevents a state candidate or office-holder from establishing a political committee, which can receive contributions

subject to FECA's source-and-amount restrictions. Funds contributed to such a political committee can be used to finance any communication for which new FECA § 323(f) requires the use of hard money.

5. **BCRA § 213's provisions governing independent and coordinated expenditures by party committees comply with the First Amendment:** Under 2 U.S.C. 441a(d), political party committees are permitted to support their candidates for federal office with coordinated expenditures that far exceed the contribution limits to which other donors are subject. See pp. 17-18 & note 11, *supra*. Once a political party has nominated a candidate for a particular federal election, BCRA § 213 requires the party either (1) to forgo independent expenditures in support of that candidate, in which case it may invoke the increased coordinated-expenditure limits applicable to political parties; or (2) to abide by the $5000 limit on contributions and coordinated expenditures that applies to political committees generally, in which case it may make unlimited independent expenditures in support of that candidate.[29] Plaintiffs' First Amendment

[29] The RNC plaintiffs suggest (Br. 73) that if a party committee makes independent expenditures in support of a nominated candidate, the party is thereafter barred from *any* coordinated spending with respect to that candidate. That is incorrect. BCRA § 213(2) adds a new FECA § 315(d)(4)(A)(i), which is codified at 2 U.S.C. 441a(d)(4)(A)(i), and provides that, after making an independent expenditure with respect to a nominated candidate, the party may not make "any coordinated expenditure *under this subsection* with respect to the candidate during the election cycle." BCRA § 213(2) (emphasis added). "[T]his subsection" refers to 2 U.S.C. 441a(d). Thus, BCRA § 213 requires the party to choose between independent expenditures and the *increased* coordinated expenditures that 2 U.S.C. 441a(d) allows party committees to make. But whichever option the party chooses, it may make direct contributions, or contributions in the form of coordinated expenditures, up to the $5000 limit that applies to political committees generally under 2 U.S.C. 441a(a)(2)(A), and it may invoke the much larger limit on national party contributions to Senate candidates established by 2 U.S.C. 441a(h).

challenges (McConnell Br. 68-70; RNC Br. 73-76) to that provision lack merit.

a. Although a party committee has a First Amendment right to make unlimited independent expenditures in support of the party's candidates, see p. 18, *supra*, it has no greater *constitutional* right to make coordinated expenditures than does any other political committee. See *Colorado II*, 533 U.S. at 455 (a political party "is in the same position as some individuals and PACs, as to whom coordinated spending limits have already been held valid"); McConnell Br. 69 (acknowledging that 2 U.S.C. 441a(d) "is not constitutionally required"). Consistent with the Constitution, Congress might have subjected party committees to the $5000 limit on coordinated spending that applies to every other multicandidate political committee, while leaving the parties free to engage in unrestricted independent spending. Under BCRA § 213, any political party remains free to choose that option with respect to any federal election. Congress's decision to provide party committees an *additional* spending option creates no constitutional infirmity.

b. Plaintiffs contend that BCRA § 213 is invalid because it "forces a choice between two *existing rights*: one statutory and the other constitutional." RNC Br. 75. But Congress may and often does condition the availability of a statutory benefit on a private party's willingness to forgo conduct in which it would otherwise have a constitutional right to engage. In *Buckley*, for example, the Court held that Congress, in establishing a program of public financing for Presidential election campaigns (see 424 U.S. at 85-109), "may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations." *Id.* at 57 n.65. The Court upheld that condition on public funding, notwithstanding its determination that FECA's free-standing limits on campaign spending by candidates for federal office violated the First Amendment. See *id.* at 54-

58. The Court explained that, "[j]ust as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding." *Id.* at 57 n.65.

BCRA § 213 does not, as the RNC plaintiffs suggest (Br. 74), reflect a "conclusive presumption" that all party spending in connection with a federal election is coordinated with the party's nominee. To the contrary, the text of BCRA § 213 expressly contemplates the prospect that a party committee can make independent expenditures in support of its candidate even after a nominee is selected. Congress reasonably determined, however, that the higher coordinated-expenditure ceilings provided in 2 U.S.C. 441a(d) should be reserved for those situations in which the relevant political party concludes (for whatever reason) that independent spending in support of a particular candidate is infeasible or politically disadvantageous.

The balance struck by Congress accords both with the original rationale for the higher party coordinated-spending limits and with this Court's decision in *Colorado I*. In 1976, when it reenacted the predecessor to 2 U.S.C. 441a(d) after this Court's decision in *Buckley*, Congress viewed party spending in support of the party's candidate as necessarily coordinated. The Conference Report accompanying the 1976 FECA amendments explained that the increased spending limits for party committees "allow[] the political parties to make contributions in kind by spending money * * * to aid the individual candidates who represent the party," and it expressed the view that, "but for this subsection, these expenditures would be covered by the contribution limitations stated in [2 U.S.C. 441a(a)(1) and (a)(2)]." H.R. Conf. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976); see *DSCC*, 454 U.S. at 28 n.1 (noting FEC's position that "[p]arty committees are considered incapable of making 'independent' expenditures

in connection with the campaigns of their party's candidates").

Thus, 2 U.S.C. 441a(d) was premised on Congress's understanding that the parties' higher level of coordinated spending would counterbalance their inability to make the unlimited independent expenditures that other political committees are allowed to make. There was never an intent to allow parties to enjoy the best of both worlds—unlimited independent expenditures and unique opportunities for substantial coordination. In enacting BCRA § 213, Congress sought to continue to provide parties with an option that reflects their distinct character and relationship to federal candidates, while acknowledging that party committees are *capable* of making independent expenditures like other political committees, and leaving them free to pursue those expenditures as an alternative to the unique opportunities for coordination allowed to parties under 2 U.S.C. 441a(d). BCRA § 213 also helps to prevent political parties from circumventing the FECA limits on their coordinated spending through the use of expenditures that are ostensibly independent but in fact rest on understandings with the party's nominee. Although BCRA § 213 does not wholly bar a party from simultaneously making independent and coordinated expenditures in support of the same federal candidate (see note 29, *supra*), it reduces the potential for abuse that such an arrangement may create.[30]

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[30] In *Colorado I*, a majority of this Court agreed that, where a party committee's expenditures are in fact independent of any candidate, the First Amendment precludes Congress from imposing any limit on the amount of money that the committee may spend. The Justices in the majority appeared to disagree, however, as to the practical feasibility of such independent expenditures. Compare 518 U.S. at 613-614 (opinion of Breyer, J.) (reviewing the record evidence and accepting the party's representation that the expenditure in question was independent of any candidate) with *id.* at 630 (opinion of Kennedy, J.) (stating that "it would be impractical and imprudent, to say the least, for a party to support its

c. For purposes of BCRA § 213, all political committees "established and maintained" by the national and state committees of a particular political party "shall be considered to be a single political committee." BCRA § 213(2) (adding FECA § 315(d)(4)(B)). That provision serves an obvious anti-circumvention purpose and does not intrude upon the parties' First Amendment rights. There is no merit to plaintiffs' claim (RNC Br. 75; McConnell Br. 70) that BCRA § 213 imposes upon the parties any form of "compelled" or "forced" association. Rather, the provision simply attaches new legal consequences to an existing *voluntary* association between different committees of the same political party.[31] A party remains free to establish any internal structure or procedures it deems necessary to ensure that the appropriate official makes the decision between independent and

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own candidates without some form of 'cooperation' or 'consultation'"). Moreover, because the expenditures at issue in *Colorado I* took place before the party's nominee had been selected, see *id.* at 612, 613-614 (opinion of Breyer, J.), the Court did not confront the practical feasibility of independent party expenditures during the post-nomination period—the only period to which BCRA § 213 applies. BCRA § 213 allows each political party, with respect to each election for federal office, to determine for itself whether independent expenditures in support of its candidate would be practical and commensurate with its interests. The First Amendment does not preclude Congress from allowing a political party to make that judgment, and then holding the party to its choice.

[31] A state party committee is already aggregated with its "subordinate committee[s]" for purposes of the coordinated spending limits set out in 2 U.S.C. 441a(d)(3). FECA has also long provided that contributions made by PACs established or controlled by any "parent, subsidiary, branch, division, department, or local unit" of a particular corporation or union "shall be considered to have been made by a single political committee." 2 U.S.C. 441a(a)(5). There is consequently nothing anomalous about a rule under which the political expenditures of one entity will affect the spending options of its affiliates.

coordinated spending with respect to each of its federal candidates.[32]

C. Title I Does Not Intrude Upon The Authority Of The States To Regulate Their Own Elections

Plaintiffs contend (see RNC Br. 78-91; McConnell Br. 26-35) that Title I violates principles of federalism by impairing the States' authority to regulate their own elections. That claim lacks merit.

1. Title I does not affect the duties, qualifications, or compensation of state officers. It does not regulate the time, place, or manner of voting, or the qualifications of voters. Title I imposes *no* requirements or prohibitions on the States themselves; it simply regulates financial transactions between private parties, and it does so in order to safeguard the integrity of *federal* elections and office-holders. None of the precedents on which plaintiffs rely remotely suggests that provisions of that character contravene principles of federalism. To the contrary, this Court, in describing the limits on congressional power imposed by the Tenth Amendment and related federalism principles, has consistently distinguished between laws that operate on the States *qua* States and those that operate directly on the citizenry. See, *e.g.*, *New York* v. *United States*, 505 U.S. 144, 166 (1992) ("In providing for a stronger central government, * * * the

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[32] Plaintiffs' reliance (RNC Br. 75; McConnell Br. 70) on *California Democratic Party* v. *Jones*, 530 U.S. 567 (2000), is misplaced. In striking down a state law requiring that party primaries be open to non-members, the Court in that case noted that the challenged law "force[d] [political parties] to adulterate their candidate-selection process * * * by opening it up to persons *wholly unaffiliated with the party.*" *Id.* at 581 (emphasis added). A law that allows *non-members* to play a potentially decisive role in the selection of the party's nominee is not remotely comparable to BCRA § 213, which simply holds a national or state party accountable for the actions of those subordinate committees that it has "established and maintained."

Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.").

2. More broadly, insofar as plaintiffs seek to invoke the principle that the national government is one of limited powers, see, *e.g.*, *United States* v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), their federalism arguments add nothing of substance to their First Amendment claims. Congress in enacting BCRA sought to protect the integrity of federal elections and to prevent corruption of federal office-holders. Plaintiffs do not dispute that those are legitimate federal objectives and that Congress possesses constitutional authority to enact laws reasonably calculated to achieve them. If the means chosen by Congress are sufficiently reasonable and tailored so as to overcome plaintiffs' First Amendment objections (see pp. 34-65, *supra*), there is no basis for challenging Title I under the principles announced in *Lopez* and *Morrison*.

3. Plaintiffs in effect posit a third federalism-related limitation on congressional authority: that congressional regulation of private conduct, even if reasonably necessary to the achievement of a valid federal objective, may be held invalid if it displaces state policy choices on a subject of particular importance to the State. That theory is flatly inconsistent with established constitutional doctrine. If Title I is an otherwise valid means of preserving the integrity of *federal* elections and preventing corruption of *federal* office-holders, the fact that it prohibits some financial transactions that the relevant State would permit, and may thus incidentally affect the way in which state electoral campaigns are financed, cannot create any constitutional infirmity. That conclusion follows both from decisions of this Court specifically addressing the regulation of federal elections, and from the Supremacy Clause itself.

a. In *Ex parte Siebold*, 100 U.S. 371 (1879), this Court upheld a federal statute that authorized federal prosecution

of a state election judge, based on the judge's breach of state-law duties in connection with an election at which both federal and state offices were contested. The Court observed that Congress's power over federal elections "is paramount, and may be exercised at any time, and to any extent which [Congress] deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith." *Id.* at 392. The Court further explained that "[i]f for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter." *Id.* at 393. In *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884), the Court reiterated that congressional authority to prevent corruption of a federal election is not "annulled because an election for State officers is held at the same time and place."

Indeed, FECA currently prohibits a variety of potential donors from making contributions to state as well as federal candidates. See 2 U.S.C. 441b (national banks and federally-chartered corporations); 2 U.S.C. 441c(a) (federal contractors); 2 U.S.C. 441e (foreign nationals); see also 18 U.S.C. 607 (as amended by BCRA § 302) (restricting fundraising on federal property in connection with both state and federal elections); *Blount*, 61 F.3d at 941-949 (upholding federal rule that restricts the ability of municipal securities professionals to contribute and solicit contributions to the campaigns of elected state officials with whom they do business).[33] Al-

[33] In *McCormick* v. *United States*, 500 U.S. 257 (1991), this Court considered the application to campaign contributions of the Hobbs Act, 18 U.S.C. 1951, an exercise of congressional authority under the Commerce Clause that makes it a federal crime to obstruct, delay, or affect interstate commerce by means of robbery or extortion. Although the Court rejected the application of the Hobbs Act to the facts before it, see 500 U.S. at 269-273, the Court held that the Act *does* prohibit a state elected official from

though Congress does not possess any freestanding authority to superintend state electoral processes, no principle of federalism bars Congress from *directly* regulating the financing of state electoral campaigns where such regulation is justified by a legitimate federal interest and is an otherwise appropriate exercise of one of Congress's Article I powers. There is consequently no basis for plaintiffs' contention that BCRA's *indirect* effects on the financing of state electoral campaigns render it an invalid means of safeguarding federal elections and preventing actual and apparent corruption of federal office-holders.

b. When an Act of Congress operates upon private parties rather than upon the States themselves, and when the law is reasonably designed to achieve a legitimate federal objective, its validity does not depend upon any balancing of state and federal interests. Indeed, even when Congress takes the more intrusive step of *preempting* state law, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free* v. *Bland*, 369 U.S. 663, 666 (1962); see *Fidelity Fed. Sav. & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982) (relying on *Free* and explaining that the legal principles generally governing federal preemption of state law "are not inapplicable here simply because real property law is a matter of special concern to the States"). The challenged provisions of Title I do not even preempt state law, in the sense of precluding the States from enforcing their own restrictions on the financing of electoral campaigns. Rather, Title I (in common with a vast range of federal legislation) simply prohibits private conduct that

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accepting campaign contributions "if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act," *id.* at 273.

some States have chosen to allow. Plaintiffs' contention that an Act of Congress may be declared invalid by reason of its asserted conflict with state policy choices turns the Supremacy Clause on its head. Cf. *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649 (1990) (referring to "the truism that States may not pre-empt federal law").

D. Title I Does Not Intrude Impermissibly Upon The Ability Of Political Party Committees To Associate And Interact With Each Other

Plaintiffs repeatedly contend (*e.g.*, RNC Br. 40; McConnell Br. 14, 16, 17) that various provisions of Title I unconstitutionally impede party committees from associating with each other in collaborative endeavors. That claim lacks merit. This Court's decisions make clear that the internal affairs of political parties are not altogether immune from reasonable government regulation, and BCRA places very modest restrictions on the freedom of political party committees to associate with each other through financial transactions.

1. This Court has rejected "the proposition that party affairs are public affairs, free of First Amendment protections." *California Democratic Party*, 530 U.S. at 573. The Court has recognized, however, that when a political party assumes an official role in the State's electoral machinery (as when the party's nominee is guaranteed a place on the ballot), it is typically subject to greater constraints than a political organization acting in a purely private capacity. The Court has "considered it 'too plain for argument,' for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion." *Id.* at 572 (quoting *American Party of Tex.* v. *White*, 415 U.S. 767, 781 (1974)).

2. Plaintiffs' characterizations of BCRA's effects on party committees' collaborative activities are substantially

overstated. Notwithstanding the McConnell plaintiffs' characterization of Title I as "pervasively regulating the relationships among party committees" (McConnell Br. 16), Title I does not restrict the ability of national and state party committees to coordinate strategy or to confer on spending priorities. It does not limit the amount of money that national party committees may disburse to state and local party committees: any and all funds lawfully acquired by a national party committee may legally be transferred to the party's state and local committees (although the Levin Amendment places some restrictions on the circumstances in which such transferred funds may be used, see pp. 49-51, *supra*). Title I also does not alter pre-existing provisions of federal law that facilitate cooperation between different committees of the same political party. See 2 U.S.C. 441a(a)(4) (FECA contribution limits "do not apply to transfers between and among political committees which are national, State, district, or local committees * * * of the same political party"); 11 C.F.R. 109.33(a) (authorizing national and state party committees to assign their authority to make coordinated expenditures to another political party committee).

E. Title I Does Not Violate The Political Parties' Rights Under The Equal Protection Component Of The Fifth Amendment Due Process Clause

The RNC (Br. 91-98) and McConnell (Br. 35-38) plaintiffs contend that BCRA's restrictions on national and state political party committees unconstitutionally discriminate against the parties and in favor of non-party interest groups. That claim lacks merit. Congress may legitimately determine that different types of organizations "require different forms of regulation in order to protect the integrity of the electoral process." *California Med. Ass'n*, 453 U.S. at 201. The FECA/BCRA regime affords political parties substantial advantages that are not available to other advocacy groups, while restricting the party fundraising practices that pose the greatest risk of actual or apparent corruption.

1. As the Court recognized in *Colorado II*, in many respects, FECA and BCRA treat political parties more favorably than other political committees. See 533 U.S. at 455. Both national and state party committees are permitted to receive contributions from individuals that substantially exceed the FECA limits on contributions to non-party political committees. See note 7, *supra*. Party committees are also permitted to make contributions to federal candidates, in the form of coordinated expenditures, in amounts much greater than the contribution limits that apply to other donors. See 2 U.S.C. 441a(d); *Colorado II*, 533 U.S. at 455 ("[A] party is better off [than individuals and PACs], for a party has the special privilege the others do not enjoy, of making coordinated expenditures up to the limit of" Section 441a(d)); note 11, *supra*. Committees of the same political party may transfer funds to each other without regard to the limits that otherwise govern contributions from one political committee to another. See 2 U.S.C. 441a(a)(4); p. 70, *supra*. Congress has also given national party committees a multi-million-dollar federal subsidy for their quadrennial conventions, see 26 U.S.C. 9008, a benefit that is not available to other entities. Those substantial advantages sharply undercut plaintiffs' equal protection claim. Compare *California Med. Ass'n*, 453 U.S. at 200-201.

2. In addition to the special privileges they enjoy, the parties' distinct role in electoral and governmental processes demands distinct treatment. "Political parties play a distinctive and in many ways privileged role. Other entities are not entitled to organize the slate of candidates presented to voters. Other entities do not organize legislative caucuses, assign committee chairs and members, or elect legislative leadership." D. Green Expert Report 8. A particular

Member of Congress may also be a member of the NRA or the Sierra Club, but his name does not appear on the election ballot as the nominee of such an organization, and his status and privileges within the legislature are not tied to the fortunes of any non-party advocacy group. See pp. 33-34, *supra*. The particular closeness of political parties to their office-holder members creates a heightened risk that a federal candidate will regard a large donation to the party as a direct benefit to himself, and may therefore be tempted to give undue weight to the interests of the donor. A majority of Congress, whose Members possess unique expertise in matters of this character, concluded that large soft-money donors to the parties had in fact acquired unwarranted influence over the legislative process and ultimately over legislative outcomes. That judgment is entitled to substantial deference, and it is supported by copious evidence showing that parties have offered and provided donors unique access to federal office-holders as a reward for large soft-money donations. See pp. 37-41, *supra*.

II. THE ELECTIONEERING-COMMUNICATIONS PROVISIONS OF TITLE II OF BCRA ARE CONSTITUTIONAL

The electioneering-communications provisions of Title II of BCRA are addressed to the second major problem that has developed in connection with federal elections over the past decade: the "spectacular rise" (Supp. App. 655sa (Kollar-Kotelly)) in candidate-centered issue advertisements that are paid for with general treasury funds amassed by corporations and unions and that are designed to influence federal candidate elections or likely to have that effect. The direct funding of such advertisements has escaped regulation under 2 U.S.C. 441b's longstanding prohibition on the use of a corporation's or union's treasury funds in connection with federal elections simply because the advertisements do not

contain express advocacy (*e.g.*, Vote for Jones), even though the advertisements are just as likely to influence federal candidate elections as advertisements that contain express advocacy. BCRA adjusts Section 441b to apply it to the funding of such candidate-centered issue advertisements—defined in BCRA § 201 as "electioneering communications." The district court invalidated BCRA § 201's primary definition of "electioneering communications," and BCRA § 203's source-of-funding limitation on the use of general treasury funds to finance such communications. Those rulings should be reversed.

A. BCRA's Electioneering-Communications Provisions Are A Natural Evolutionary Step In Congress's Longstanding Regulation Of Corporate And Union Electoral Spending

In analyzing challenges to campaign-finance laws, this Court is sensitive to the "historical prologue" of the provisions at issue. *FEC* v. *Beaumont*, 123 S. Ct. 2200, 2207 (2003); see *id.* at 2205-2207, 2210-2211 n.9; see also *United States* v. *Automobile Workers*, 352 U.S. 567, 570 (1957) (*UAW*) ("Appreciation of the circumstances that begot this statute is necessary for its understanding, and understanding of it is necessary for adjudication of the legal problems before us."). BCRA's electioneering-communications provisions are a natural and incremental outgrowth of the hallmark of federal campaign-finance regulation during the twentieth century: Congress's effort to curb the unique threat that treasury funds accumulated by corporations and labor unions with the help of their form present to the integrity of the federal electoral process.

1. *For Almost A Century, Congress Has Cautiously Regulated The Manner In Which Federal Political Activity May Be Financed By Corporations And Labor Unions*

a. As this Court emphasized in *Beaumont*, "[s]ince 1907, there has been continual congressional attention to corporate political activity." 123 S. Ct. at 2205; see *id.* at 2205-2207 & n.3; see also *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 208-209 (1982) (*NRWC*); Supp. App. 15sa-38sa (per curiam); *id.* at 481sa-482sa (Kollar-Kotelly). That attention is a product of the unique "dangers posed by [corporations and labor unions] to the electoral process." *NRWC*, 459 U.S. at 209; see *Beaumont*, 123 S. Ct. at 2206; *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658-659 (1990); *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257-259 (1986) (*MCFL*); *FEC* v. *National Conservative Political Action Comm.*, 470 U.S. 480, 500-501 (1985) (*NCPAC*); *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 201 (1981); *UAW*, 352 U.S. at 570-571. Indeed, federal campaign-finance regulation itself was borne of "a 'popular feeling' in the late 19th century 'that aggregated capital unduly influenced politics, an influence not stopping short of corruption.'" *Beaumont*, 123 S. Ct. at 2205 (quoting *UAW*, 352 U.S. at 570). And the concern that —if left unregulated—"corporate earnings" will be "conver[ted] into political 'war chests,'" *id.* at 2206, remains to this day one of the central fixtures of this Court's campaign-finance jurisprudence.

In particular the Court has stressed that the "state-created advantages" of the corporate form afford corporations "an unfair advantage in the political marketplace." *Austin*, 494 U.S. at 659 (quoting *MCFL*, 479 U.S. at 257). As the Court reiterated in *Beaumont*:

> State law grants corporations special advantages—such as limited liability, perpetual life, and the favorable treatment of the accumulation and distribution of assets —that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace."

123 S. Ct. at 2206 (quoting *Austin*, 494 U.S. at 658-659). "[T]he political advantage of corporations is unfair," the Court has explained, because "[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas," but rather "reflect * * * the economically motivated decisions of investors and customers." *Austin*, 494 U.S. at 659; see *Beaumont*, 123 S. Ct. at 2206.[34]

The Court has recognized that labor organizations enjoy a similar advantage in terms of their capacity to influence federal elections with "aggregated wealth" that does not necessarily reflect the popularity of their political ideas. *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 416 (1972); see *NRWC*, 459 U.S. at 207-208; *UAW*, 352 U.S. at 585; *United States* v. *CIO*, 335 U.S. 106, 113 (1948).

b. Over the past 95 years, Congress has engaged in "careful legislative adjustment of the federal electoral laws, in a cautious advance, step by step," "to account for the particular legal and economic attributes of corporations and labor unions," *NRWC*, 459 U.S. at 209 (internal quotation

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[34] Nonprofit corporations that qualify under Section 501(c)(4) of the Internal Revenue Code also receive a valuable subsidy in the form of an exemption from federal income taxation. See *Taxation with Representation*, 461 U.S. at 544; see also *Beaumont*, 123 S. Ct. at 2209 (noting the "powerful" political influence of "corporations that qualify for favorable tax treatment under § 501(c)(4)").

marks omitted), and respond to the efforts of "candidates, donors, and parties [to] test the limits of the current law," *Beaumont*, 123 S. Ct. at 2207. Initially, in 1907, Congress made it unlawful for "any corporation whatever" to make "a money contribution" in connection with a federal election. Act of Jan. 26, 1907, ch. 420, 34 Stat. 864. Then, over the next 40 years, Congress expanded the original prohibition on *money* contributions to include "*anything* of value," Federal Corrupt Practices Act of 1925, ch. 368, § 302(d), 43 Stat. 1071 (emphasis added); extended the coverage of the prohibition from corporations to labor unions, War Labor Disputes Act, ch. 144, § 9, 57 Stat. 167; and extended the prohibition on direct corporate and union contributions to include "expenditure[s]," Labor-Management Relations Act, 1947, ch. 120, § 304, 61 Stat. 159; see also Supp. App. 22sa-23sa (per curiam) (discussing legislative history of Act).

2 U.S.C. 441b, which Congress enacted in 1971, is "merely a refinement of this gradual development of the federal election statute." *NRWC*, 459 U.S. at 209. As discussed, that provision prohibits corporations and labor unions from making any contributions or expenditures in connection with federal elections, but permits such entities to participate in the federal electoral process through a separate segregated fund. See *id.* at 201; *Beaumont*, 123 S. Ct. at 2203-2204; 2 U.S.C. 441b(b)(2)(C); see also p. 4, *supra*.

c. As this Court recounted in *Beaumont*, the Court's "cases on campaign-finance regulation represent respect for the 'legislative judgment that the special characteristics of the corporate structure require particularly careful regulation.'" 123 S. Ct. at 2207 (quoting *NRWC*, 459 U.S. at 209-210). In *Beaumont*, the Court rejected a challenge brought by a nonprofit advocacy corporation to Section 441b's prohibition on contributions. 123 S. Ct. at 2203. In doing so, the Court emphasized that "[a]ny attack on the federal prohibition of direct corporate political contributions goes

against the current of a century of congressional efforts to curb corporations' potentially 'deleterious influences on federal elections,' which we have canvassed a number of times before." *Id.* at 2205 (quoting *AUW*, 352 U.S. at 585); see also *NRWC*, 459 U.S. at 209-211.

In *MCFL*, this Court held that Section 441b's prohibition on *independent expenditures* could not constitutionally be applied to a nonprofit corporation with three "essential" features: (i) "it was formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (ii) it "has no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (iii) it "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." 479 U.S. at 263-264. In so holding, the Court explained that corporations with those key features do not pose a sufficient "danger of corruption," in the context of regulating political expenditures, to justify the "regulation of corporate political activity" that the Court has upheld as to contributions. *Id.* at 259; see *id.* at 257-260.

In *Austin*, by contrast, the Court upheld the application of a state law limit on corporate independent expenditures—modeled on 2 U.S.C. 441b—to a nonprofit corporation that did not share the essential features of the corporation in *MCFL*. 494 U.S. at 654-655 & n.1. Although the Court recognized that *Buckley* had held unconstitutional a limitation on the independent election expenditures of *individuals*, see 424 U.S. at 47, the Court concluded that the equation was different in the case of *corporations*, given "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin*, 494 U.S. at 660. Indeed, the Court held that the source-of-funding limitation

on independent expenditures by corporations at issue in *Austin* passed strict scrutiny. *Id.* at 658-661.

Together, *Austin* and *MCFL* make clear that the Constitution permits source-of-funding limits on corporate expenditures in connection with candidate elections with respect to corporations that do not share the "crucial features" of the nonprofit corporation in *MCFL*. *Austin*, 494 U.S. at 662. Indeed, Justice Brennan—who authored the opinion for the Court in *MCFL*—joined the Court's decision in *Austin* and wrote a separate concurrence emphasizing that *MCFL* is limited to the unique type of nonprofit corporation in that case. See *id.* at 669-675.

Thus, even in the context of "independent campaign expenditures" entitled to the highest protection, *Austin*, 494 U.S. at 657, this Court's precedents establish that government has broad leeway to protect the federal electoral process from the potential corruption associated with the use of general treasury funds by corporations and labor organizations. In addition, the Court's decisions further recognize that Congress may require non-*MCFL* corporations and unions to take the relatively simple but nonetheless critical regulatory step of establishing and making independent election expenditures through a separate segregated fund, which also allows for disclosure without compromising the associational interests of the broader corporate entity.

2. *BCRA's Electioneering-Communications Provisions Were Enacted To Plug A Loophole In Existing Law That Has Been Exploited By Corporations And Unions*

The political marketplace has always shown extraordinary resilience in adapting to—and finding ways around—federal campaign-finance limits. As the record in this case amply demonstrates, Title II of BCRA was enacted in response to that same driving force. See Supp. App. 40sa (per curiam);

see *id.* at 651sa (Kollar-Kotelly); *id.* at 1308sa (Leon); see also *Beaumont*, 123 S. Ct. at 2207 ("[E]xperience demonstrates how candidates, donors, and parties test the limits of the current law.") (internal quotation marks omitted).

a. FECA's general definition of "expenditure" includes the provision of "anything of value * * * for the purpose of influencing any election for Federal office." 2 U.S.C. 431(9)(A)(i). In *MCFL*, the Court construed 2 U.S.C. 441b so "that an expenditure must constitute 'express advocacy' in order to be subject to [its] prohibition." 479 U.S. at 249. The Court based that "construction" on a passage in *Buckley*, where the Court, in construing a different provision of FECA, "adopted the 'express advocacy' requirement to distinguish [for purposes of that provision] discussion of issues and candidates from more pointed exhortations to vote for particular persons." *Ibid.* The *Buckley* construction read the relevant provision to apply "to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' defeat,' 'reject.'" 424 U.S. at 44 n.52. Those phrases have been referred to as *Buckley*'s "magic words," because, under *MCFL*, 479 U.S. at 248-249, corporate- or union-funded communications that contain those words are subject to Section 441b's limitation.[35]

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[35] The FEC has promulgated a regulation that defines "express advocacy" in more flexible terms. 11 C.F.R. 100.22(b). Some lower courts have concluded that that regulation is invalid, reasoning that *MCFL* "engrafted *Buckley*'s 'explicit words of advocacy' limitation onto § 441b(a)," and that the lower courts are "bound by" that statutory construction. *Virginia Society for Human Life* v. *FEC*, 263 F.3d 379, 391-392 (4th Cir. 2001). At the same time, however, in response to the FEC's "powerful" argument concerning the need to construe the express-advocacy test in a manner that prevents circumvention of its requirements, the court of appeals in *Virginia Society* emphasized that neither this Court nor Congress was bound by *MCFL*'s construction of 2 U.S.C. 441b(a). *Ibid.* In Title II of BCRA, Congress took matters into its own hands.

b. In the wake of *MCFL*, corporations and labor unions began to circumvent the express-advocacy requirement and pour hundreds of millions of dollars in general treasury funds into candidate-centered advertisements that avoided words of express advocacy but were just as likely if not more likely to influence the outcome of federal candidate elections as advertisements that contained express advocacy. Significantly, although plaintiffs wage a multi-faceted attack on the solution that Congress devised, they do not deny the powerful forces that led to its enactment.

i. "Approximately ten years after *MCFL*, during the 1996 election cycle, corporations and labor unions began aggressively to use general treasury funds to pay for 'issue advocacy' campaigns that avoided express advocacy but were designed to influence federal elections." Supp. App. 652sa (Kollar-Kotelly); see *id.* at 652sa-658sa (detailing "spectacular rise in candidate-centered issue advertising"); *id.* at 1306sa-1308sa (Leon) (same); see also *id.* at 39sa (per curiam) (noting "widespread" use of such issue advocacy).

For example, the evidence shows an escalating cycle of activity. During the 1995-1996 election cycle, about $135 to $150 million was spent by organizations on multiple broadcasts of about 100 separate issue advertisements; during the 1997-1998 election cycle, about $250 to $340 million was spent by 77 organizations on broadcasts of 423 separate issue advertisements; and during the 1999-2000 cycle, more than $500 million was spent by 130 groups on 1100 separate issue advertisements. See Supp. App. 655sa (Kollar-Kotelly); *id.* at 806sa-807sa; *id.* at 1306sa (Leon). Plaintiffs' "own expert readily concede[d] that the number of organizations sponsoring issue advertisements has 'exploded' over the past three election cycles." *Id.* at 807sa (citing La Raja testimony).

That trend is not happenstance. It is "uncontroverted that * * * by 1996, interest groups had developed a strategy to effectively communicate an electioneering message

for or against a particular candidate without using the magic words and thus avoid disclosure requirements, contribution limits and source limits." Supp. App. 657sa-658sa (Kollar-Kotelly); see *id.* at 664sa-668sa (explaining why "express advocacy" is an "ineffective criteri[on] for distinguishing between genuine issue advertisements and advertisements that do not use express advocacy but are designed to influence a federal election"); see *id.* at 1299sa-1306sa (Leon).

As Judge Kollar-Kotelly explained, "[t]he record persuasively demonstrates that corporations and unions routinely seek to influence the outcome of federal elections with general treasury funds by running broadcast advertisements that skirt the prohibition contained in section 441b by simply avoiding *Buckley*'s 'magic words' of express advocacy." Supp. App. 778sa; see *id.* at 814sa-821sa (discussing evidence). Judge Leon similarly observed that, "Congress concluded, and the record more than adequately demonstrates, that in the twenty-eight years since *Buckley*, corporations, unions, and interest groups, have increasingly affected federal elections by funding out of their general treasuries uncoordinated 'issue ads' that either they, or a political party, ran in the months leading up to an election" and that "avoid regulation as express advocacy." *Id.* at 1160sa (record citations omitted); see *id.* at 1315sa-1325sa (discussing evidence); *id.* at 106sa (per curiam).

A side by side comparison of two advertisements that were broadcast in 2000 by the NRA—whose Executive Vice President acknowledged that the NRA "spent what it took to defeat Al Gore" in 2000, Supp. App. 694sa (Kollar-Kotelly) (quoting LaPierre testimony)—illustrates the ease with which Section 441b was circumvented by corporations and unions. One advertisement was paid for by the NRA's PAC and the other by the NRA's general treasury. Both advertisements clearly identify Al Gore, are nearly identical in their content, and would in all likelihood have the same

influence on the Presidential election in the districts in which the advertisements were run. The only significant difference between the advertisements is that the tag line at the end of the advertisement paid for by the PAC says "Vote George W. Bush for President." *Id.* at 695sa-696sa (comparison).[36]

ii. The express-advocacy test is not only easy to circumvent, but it does not accurately identify communications designed to affect candidate elections. Even when they are overtly designed for electioneering, "the overwhelming majority of modern campaign advertisements do not use words of express advocacy, whether they are financed by candidates, political parties, or other organizations." Supp. App. 658sa (Kollar-Kotelly); see *id.* at 1296sa (Leon) ("The record convincingly demonstrates that the overwhelming majority of modern political advertisements do not use words of express advocacy."). Indeed, "[t]he uncontroverted testimony of political consultants demonstrates that it is neither common nor effective to use the 'magic words' of express advocacy in campaign advertisements." *Id.* at 659sa (Kollar-Kotelly); see also *id.* at 659sa-664sa (discussing evidence); *id.* at 808sa-809sa.

As one political consultant explained, "[i]n the modern world of 30 second political advertisements, it is rarely advisable to use such clumsy words as 'vote for' or 'vote against.'" Supp. App. 809sa (Kollar-Kotelly) (quoting Bailey testimony). The record confirms that observation by showing that even candidates—who have no financial or regulatory incentive to do so—typically avoid express advocacy. "The unrebutted expert testimony demonstrates that only 11.4 percent of advertisements purchased by federal candidates that aired during the 2000 election cycle would qualify as electioneering under the 'magic words' test." *Id.* at 808sa (Kollar-Kotelly). Present and former office-holders and candidates likewise confirmed that the express-advocacy test, as one Senator put it, "has no real bearing in today's world of campaign ads." *Id.* at 665sa (quoting 147 Cong. Rec. S3036 (daily ed. Mar. 28, 2001) (statement of Sen. McCain)); see *id.* at 665sa-668sa, 813sa-814sa.

[36] Numerous other examples are contained in the record and underscore the efforts of many of the plaintiffs in this case to circumvent the express-advocacy test. See Supp. App. 678sa-685sa, 693sa-697sa (Kollar-Kotelly) (discussing, *inter alia*, AFL-CIO's and NRA's use of issue advertisements to engage in electioneering). In addition, defendants filed a video presentation in the district court that contains examples of advertisements run in connection with recent elections and demonstrates how advertisements that do not trigger the express-advocacy test may nonetheless have virtually the same effect on an election.

Accordingly, prior to BCRA, federal law (2 U.S.C. 441b) prohibited corporations and unions from using their general treasury funds to pay for electioneering advertisements that contained express advocacy, but left them free to spend their treasuries on electioneering advertisements that are considered by candidates and political consultants to be if anything *more* effective in influencing elections because they do *not* contain express advocacy. As discussed above, corporations and unions not only have taken note of that loophole, but they have in each of the past few federal election cycles funneled increasing amounts of their general treasury funds into federal elections *through* that loophole.

iii. The record establishes that federal office-holders and candidates are aware of and feel indebted to corporations and unions that finance electioneering advertisements on their behalf or against their opponents. See Supp. App. 836sa-837sa (Kollar-Kotelly). For example, the evidence shows that "Members of Congress seek to have corporations and unions run these advertisements on their behalf"; "corporations and labor unions target[] particular federal candidates or their opponents" for electioneering advertisements; and "candidates are very appreciative of the additional electioneering support provided on their behalf from the general treasuries of corporations and labor unions." *Id.* at

837sa-838sa; see also *id.* at 708sa-719sa (discussing evidence). Former officer-holders and candidates confirmed that they "are very aware of who ran advertisements on their behalf and feel indebted to those who spend money to help get them elected." *Id.* at 711sa.[37]

Equally problematic is the specter of corruption associated with such advertisements. "[A] large majority of Americans (80%) are of the view that corporations and other organizations that engage in electioneering communications, which benefit specific elected officials, receive special consideration from those officials when matters arise that affect these [entities]." Supp. App. 837sa (Kollar-Kotelly); see *id.* at 713sa-714sa (discussing record).

c. Congress responded to those phenomena by enacting Title II of BCRA. See Supp. App. 482sa-483sa & n.1 (Kollar-Kotelly) (legislative history of BCRA); *id.* at 674sa-675sa. As discussed above, Title II adjusted the longstanding prohibition on the use of corporate and union general treasury funds in connection with a federal election to cover "electioneering communications," as defined in BCRA § 201, that in all likelihood, based on the presence of certain objective factors, will affect the outcome of federal elections, even if they do not contain particular words of express advocacy. BCRA § 203; FECA § 316(b)(2); 2 U.S.C. 441b(b)(2). BCRA left in place the FECA provisions that permit a corporation and labor union to establish a separate segregated fund, which in turn may make contributions and independent expenditures and, in particular, pay for "electioneering communications." Congress also updated the disclosure requirements for entities that make electioneering communications and individuals or entities that contribute to such entities, so

[37] See also Defs.' D. Ct. Opening Br. 41-42, 45 (discussing evidence showing that certain organizations sought credit from Members of Congress for broadcasting election-related advertisements).

that the electorate will know what interests are funding which candidates and will be able to make more informed predictions about future performance. See Part II.D, *infra*.

B. BCRA's Source Limitation On Electioneering Communications Is Narrowly Tailored To Advance Public Interests That This Court Has Repeatedly Recognized As Compelling

This Court has held that "independent campaign expenditures constitute 'political expression'" entitled to the highest constitutional protection. *Austin*, 494 U.S. at 657. In reviewing plaintiffs' challenge to the constitutionality of BCRA's electioneering-communications provisions, the Court must therefore decide whether those provisions are narrowly tailored to advance a compelling government interest. See *id.* at 658-661. This Court's prior precedents bear strongly on that determination.

The Court has repeatedly recognized that by limiting electioneering activity to a separate segregated fund, the campaign-finance laws by no means impose a "complete ban" on such activity. *Beaumont*, 123 S. Ct. at 2211; see *Austin*, 494 U.S. at 660. Moreover, *Austin* and *MCFL*, discussed *supra*, establish that the existing prohibition in Section 441b on the *direct* funding of corporate and union independent expenditures in connection with federal elections—including for express advocacy—passes strict scrutiny for non-*MCFL* corporations. Congress's adjustment of Section 441b to cover corporate or union disbursements for "electioneering communications" that meet BCRA's primary definition—political activity entitled to no more protection under the First Amendment than the expenditures long regulated by that provision—passes strict scrutiny too. Indeed, the record compiled in this case supporting Congress's judgment with respect to the need for that limitation dwarfs the showing

that this Court found sufficient in upholding the source limitation on expenditures in *Austin*. See 494 U.S. at 660.

1. *BCRA's Electioneering-Communications Provisions Advance Several Compelling Government Interests*

a. The Court has long recognized that the interest in protecting federal elections from real or apparent corruption is "of the highest importance." *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 788-789 (1978); see *id.* at 788 n.26 ("The importance of the governmental interest in preventing [corruption] has never been doubted."); *NCPAC*, 470 U.S. at 496-497 ("preventing corruption or the appearance of corruption are * * * compelling government interests"); *Buckley*, 424 U.S. at 27. Such corruption "directly implicate[s] the 'integrity of our electoral process,'" *NRWC*, 459 U.S. at 208 (quoting *UAW*, 352 U.S. at 570), and thus strikes at the foundation of American democracy.

BCRA's source-of-funding limitation on electioneering communications protects against the same "type of corruption" that this Court identified in *Austin*—*i.e.*, "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." 494 U.S. at 660; see *ibid.* ("[T]he unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures"). In addition, the government has a related but equally important interest in "protect[ing] the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed." *NRWC*, 459 U.S. at 208; see *Austin*, 494 U.S. at 660; *Beaumont*, 123 S. Ct. at 2206.

In *Austin*, this Court held that a State's effort to address those forms of corruption supplied "a sufficiently compelling rationale to support its restriction on independent expenditures by corporations," emphasizing that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." 494 U.S. at 660. BCRA's source limitation on the financing of electioneering communications directly advances the same "compelling" interest identified in *Austin* by requiring corporations and unions to finance electioneering communications through a separate segregated fund that consists of contributions from individuals who choose to fund such political activity, as opposed to general treasury funds that are accumulated as a result of the benefits of the corporate form and may or may not correlate with public support for the corporation's or union's political activity. See *id.* at 660-661.

The NRA argues (Br. 20) that "[t]he specific danger identified in *Austin* * * * has no application to speech by nonprofit membership organizations that are devoted to the advancement of specific rights and ideas and are funded almost exclusively by the dues and donations of individual members." That argument, however, is fully answered by this Court's decision to exempt *MCFL* corporations, but only *MCFL* corporations, from Section 441b's corporate expenditure restrictions. In *Austin*, this Court rejected the argument that the rationale of *MCFL* should be extended to nonprofit corporations that do not share MCFL's "crucial features," let alone to traditional for-profit corporations. 494 U.S. at 662.

In another case, the NRA successfully contended that it qualified as an *MCFL* corporation in certain years, while the FEC took a different view. See *FEC* v. *National Rifle Ass'n*, 254 F.3d 173, 192 (D.C. Cir. 2001). This wide-ranging case is hardly a proper vehicle for the Court to resolve that

entity-specific issue. Suffice it to say that if the NRA can demonstrate that it is an *MCFL* corporation, then its concerns about applicability of *Austin*'s distortion rationale to it will be addressed. But, in any event, especially in light of the potential availability of *MCFL*'s safe harbor, those concerns provide no basis for invalidating BCRA's electioneering-communication provisions on their face.[38]

b. The Court has stressed that the government also has a compelling interest in insulating federal elections from the type of corruption arising from the real or apparent creation of political debts. See *NRWC*, 459 U.S. at 207-208. The Court has repeatedly recognized that that interest is directly served by Section 441b's limitation on corporate and union campaign *contributions*. See *Beaumont*, 123 S. Ct. at 2207; *NRWC*, 459 U.S. at 207. In *NCPAC*, the Court held that the danger of such real or apparent quid pro quo corruption was not sufficient to justify a limit on independent expenditures that applied, *inter alia*, to unincorporated groups and to PACs not connected to a corporation. See 470 U.S. at 496, 500-501; see *id.* at 496 (recognizing that Court did not "need to reach * * * the question whether a corporation can constitutionally be restricted in making independent expenditures to influence elections for public office"). In *Austin*, however, this Court specifically recognized "that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by *corporations* to influence candidate elections." 494 U.S. at 659 (emphasis added); see *Bellotti*, 435 U.S. at 788 n.26.

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[38] The NRA itself agreed in the district court to "stay any as-applied challenge [it] had against BCRA under *MCFL* until the Supreme Court resolved the merits of Plaintiffs' challenge to BCRA." Supp. App. 833sa (Kollar-Kotelly). Any nonprofit corporation, especially the NRA in light of its agreement, that believes it is entitled to exemption under *MCFL* should be required to litigate that claim on an as-applied basis in a different case if the FEC disputes the issue. See *id.* at 871sa.

Although the Court did not need to reach the issue in *Austin*, see 494 U.S. at 659-660, and it need not do so here in light of the fact that Title II of BCRA directly advances the government's compelling interest in eliminating the specific type of corruption identified and relied on in *Austin*, the record in this case nonetheless demonstrates a sufficient risk of real or apparent quid pro quo corruption to justify Congress's judgment that corporations and unions should be prevented from using general treasury funds to finance "electioneering communications." See Supp. App. 835sa (Kollar-Kotelly) ("The record powerfully demonstrates that electioneering communications paid for with the general treasury funds of labor unions and corporations endears those entities to elected officials in a way that could be perceived by the public as corrupting."); *id.* at 708sa-718sa, 835sa-838sa; *id.* at 1161sa-1162sa & n.117 (Leon) (reaching same conclusion); pp. 83-84, *supra*.

NRA states that "gratitude for political support is not corruption." NRA Br. 17 (heading); see *id.* at 17-19. But gratitude for political support in the form of *contributions* directly from a corporate or union treasury has long been viewed as corruption, as has gratitude for political support in other forms. See Part I.A, *supra*. The record in this case confirms Congress's judgment that further adjustment of Section 441b was needed to eliminate the fact or expectation of a candidate's political indebtedness stemming from the use of corporate and union treasury funds to broadcast electioneering communications clearly targeted to support a particular candidate or attack his opponent. Even the appearance of such corruption is sufficient to justify Congress's enactment of Title II, regardless of whether federal officeholders who have benefitted from those advertisements in fact have responded with political favors.

c. Finally, the government has a compelling interest in preventing the circumvention of existing statutory limits.

See *Beaumont*, 123 S. Ct. at 2207; *Colorado II*, 533 U.S. at 457; *California Med. Ass'n*, 453 U.S. at 198-199. As discussed above, despite the longstanding federal policy against the use of corporate and union general treasury funds to influence federal elections, corporations and unions have poured hundreds of millions of dollars into federal elections since at least 1996 in the form of broadcast advertisements that do not trigger *Buckley*'s express-advocacy requirement but nonetheless have essentially the same influence on elections as advertisements whose direct funding would be proscribed by Section 441b if they contained the requisite words of express advocacy. See pp. 80-82, *supra*.

Congress's compelling interest in preventing the evasion of existing limits is all the more compelling when, as here, the record demonstrates that those limits are practically illusory and other political actors have demonstrated that the preexisting limits no longer accurately delimit core electioneering expenditures. In light of the hundreds of millions of dollars spent by corporations and unions on advertisements virtually indistinguishable from electioneering advertisements funded by *candidates themselves*, see pp. 82-83, *supra*, Congress clearly needed to update the limits on corporate and union expenditures to prevent the evasion of the longstanding policy embodied in Section 441b.

2. *BCRA's Electioneering-Communications Provisions Are Narrowly Tailored To Advance A Compelling Government Interest*

BCRA's source-of-funding limitation on "electioneering communications," as defined in BCRA § 201, is narrowly tailored to achieve the compelling government interests discussed above. Indeed, here, as in *Austin*, that source limitation on expenditures is carefully "targeted" to eliminate the particular threats of corruption and circumvention to which the limitation is aimed, and yet still allows corporations and

unions "to express their political views" in the form of electioneering communications through a separate segregated fund. 494 U.S. at 660. Any contrary conclusion would impose an unattainable legislative burden on Congress in seeking to close the enormous loophole discussed above, see pp. 80-82, *supra*, the existence of which is not even controverted by plaintiffs.

a. BCRA's primary definition of "electioneering communications" (§ 201) is clear and objective. An advertisement falls within the definition only if it satisfies four criteria. First, it must be distributed by broadcast, cable, or satellite —*i.e.*, television or radio. Second, it must refer to "a clearly identified candidate for Federal office." Third, it must be distributed within 60 days before a general election or 30 days before a primary election. Fourth, it must be "targeted" to the identified candidate's electorate, *i.e.*, the advertisement must reach at least 50,000 voters in the relevant district or State in an election for the House of Representatives or the Senate. See BCRA § 201(a); FECA § 304(f)(3)(A).[39]

In defining the "electioneering communications" subject to BCRA's source limitation Congress thus established a bright-line, readily administrable test that avoids the pitfalls that this Court identified in *Buckley*. See 424 U.S. at 42-43 (discussing the problems in attempting to distinguish between advertisements based on subjective and manipulable inquiries such as the intent of speakers or understanding of listeners). The remarkable clarity of that definition is exemplified by the fact that, notwithstanding the numerous challenges raised in this litigation, none of the plaintiffs has

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[39] In addition, Congress further narrowed the definition of "electioneering communications" by explicitly exempting certain additional communications, including those appearing within a news story or editorial. See BCRA § 201(a); FECA § 304(f)(3)(B); see also Supp. App. 841sa-843sa (Kollar-Kotelly).

seriously argued that the primary definition of electioneering communications is in any way vague. See Supp. App. 800sa (Kollar-Kotelly); *id.* at 801sa-803sa.

As explained below, in challenging the primary definition of "electioneering communications," plaintiffs attempt to show that the definition captures at least some so-called "genuine" issue advertisements that—even though they clearly identify a federal candidate and are broadcast in the time frame and place in which they are most likely to influence a candidate's election—purportedly are not designed to influence electoral outcomes. That challenge fails, for the reasons explained below. At the outset, however, it is significant to note that because of the exceptional clarity of the lines drawn by BCRA's primary definition, any entity truly not interested in airing electioneering communications may easily avoid the source limitation on such communications by simply not referring to a candidate for federal office, running the advertisement outside the 30- or 60-day window, or running the advertisement outside the candidate's district. The clarity with which Congress defined "electioneering communications" therefore itself has considerable constitutional virtue from the standpoint of entities interested in communicating only about genuine issues, and not in influencing the election of particular candidates.

b. Congress—whose Members are the central participants in the scheme regulated by BCRA—is uniquely positioned to identify the factors that separate communications that are intended to influence the outcome of their elections and communications that are simply intended to promote debate on particular issues. BCRA's objective factors are each carefully calibrated to prevent corporations and unions from circumventing Section 441b's source prohibition on election-related expenditures by using general treasury funds to broadcast advertisements that do not trigger the express-advocacy test but nonetheless will in all likelihood

have the effect of influencing federal candidate elections. While "genuine" issue advocacy can readily be accomplished in a manner that does not trigger Title II of BCRA, BCRA § 201's definition makes it very difficult for "sham" issue advocacy to circumvent Title II.

i. BCRA § 201's definition of "electioneering communications" is limited to advertisements distributed by broadcast, cable, or satellite (*i.e.*, television and radio). The record demonstrates that those media are the most common media in which advertisements seeking to influence elections have been distributed by corporations and unions because those media reach the largest audience and are considered to be the most effective means of communicating an electioneering message. See Supp. App. 736sa-743sa (Kollar-Kotelly). As one political communications consultant testified, "among the various media outlets 'for conveying [the NRA's] message, the most powerful is the use of "paid broadcast media," which simply refers to paid media that is broadcast over network, cable, or satellite television, or over radio.'" *Id.* at 739sa (McQueen testimony).

ii. The definition applies only to advertisements that refer to "a clearly identified candidate for Federal office." Not surprisingly, the unrebutted evidence shows that "most advertisements designed to influence federal elections refer to a federal candidate." Supp. App. 847sa & n.129 (Kollar-Kotelly); see *id.* at 719sa-725sa, 845sa-846sa. Federal officeholders confirmed that fact. *Id.* at 668sa. Conversely, the uncontroverted evidence also shows that it is not necessary to refer to "specific candidates for federal office in order to create effective [issue] ads.'" *Id.* at 846sa (Bailey testimony). Furthermore, an advertisement that clearly refers to a candidate for federal office, as opposed to one that simply discusses an issue (without referring to a candidate), creates a greater risk of an appearance of corruption because the public is more likely to perceive that a candidate will

become indebted to a corporation or union that buys advertising that clearly identifies him or his opponent.

iii. The timing requirement is also directly tied to Congress's objective of capturing advertisements that are likely to influence the outcome of federal elections. The record "overwhelmingly demonstrate[s] the appropriateness of BCRA's sixty and thirty day benchmarks," and confirms with remarkable clarity the common-sense conclusion "that issue advertisements aimed at influencing federal elections are aired in the period right before an election." Supp. App. 725sa-728sa, 847sa-848sa (Kollar-Kotelly) (discussing evidence); see *id.* at 851sa ("The sixty and thirty-day figures are not arbitrary numbers selected by Congress, but appropriate time periods tied to empirically verifiable data.").

iv. The definition of "electioneering communications" is further tailored by focusing only on advertisements that are targeted to the relevant electorate of the candidate identified in the advertisement. In particular, with respect to advertisements run in connection with elections for the House of Representative and the Senate, an advertisement that mentions a candidate and is run in the period before the election does not constitute an "electioneering communication" unless 50,000 or more individuals in the candidate's district or State may receive the communication. See BCRA § 201(a); FECA § 304(f)(3)(C); 2 U.S.C. 434(f)(3)(C). That criterion, too, is significant because, as Judge Kollar-Kotelly explained, "[b]roadcast advertisements that target substantial portions of the electorate who decide a candidate's political future are those most likely to influence an election, and earn the candidate's gratitude." Supp. App. 854sa.

c. In short, BCRA's primary definition of "electioneering communications" targets advertisements that are run in the most effective communications media for reaching voters (broadcast); are clearly associated with a particular federal candidate (by identifying a candidate or his opponent); and

are run during the period and in the place where they are most likely to be perceived by voters and candidates as relating to an upcoming candidate election (shortly before the election and in the candidate's own district). So, for example, the NRA can freely finance anywhere and anytime broadcast advertisements trumpeting the Second Amendment that do not refer to a particular candidate; it can freely complain about a particular Senator's crusade against gun rights without limitation in election cycles in which he does not stand for reelection and in 49 States even when he does run; and if it wants to complain about the Senator to his voters in the critical days before his election in a broadcast advertisement, it still may do so—it simply must act through a separate segregated fund.[40]

Zeroing in on advertisements that meet BCRA § 201's criteria directly advances each of the compelling government interests discussed above. First, it prevents corporations from deploying funds amassed with the benefit of the corporate form to broadcast advertisements that are designed to or will influence candidate elections, but yet do not necessarily correlate with public support for the corporation's political ideas. Second, it eliminates the danger—demonstrated by the record in this case—that candidates who benefit from advertisements that clearly identify them or their opponents and that are run at the most critical junctures of their campaigns will become indebted to the corporations and unions that pay for those advertisements, or that the public will perceive such indebtedness. Third, it prevents corporations and unions from circumventing the federal policy embodied in Section 441b by funding adver-

[40] In addition, the NRA may run print advertisements, send direct mail, or use phone banks to target a particular candidate in the days before an election in his district without even having to take the minimal step of using a separate segregated fund.

tisements that do not contain express advocacy but yet are virtually indistinguishable from most *candidate*-funded advertisements and thus presumably are designed to have the same influence on the election of candidates.

Because BCRA's source limitation on "electioneering communications" (BCRA § 201) is narrowly tailored to advance a compelling government interest, it is constitutional. In at least two important respects, that conclusion follows directly from this Court's precedents. First, this Court has held that a general prohibition on the use of a corporation's general treasury funds to make political expenditures survives strict scrutiny. The expenditures at issue in this case are entitled to no greater protection than the expenditures at issue in *Austin*, and the record demonstrating the need to limit those expenditures is much stronger here than in *Austin*. Second, this Court has recognized that Section 441b may be applied to corporate and union spending on advertisements that are intended to influence federal elections if they expressly advocate for or against a candidate. BCRA § 201's definition of "electioneering communications" is carefully calculated to regulate candidate-centered advertisements that are likely to have the same effect on the outcome of federal candidate elections but just avoid the magic words.

C. Plaintiffs' Challenges To BCRA's Source-Of-Funding Limitation Should Be Rejected

Neither plaintiffs nor the district court has provided any reason for this Court to reach a different conclusion in reviewing BCRA's source-of-funding limitation on electioneering communications.

1. *BCRA's Source-Of-Funding Limitation On Electioneering Communications Does Not "Ban" Any Speech Whatever*

a. In attacking Title II, plaintiffs greatly exaggerate its effect, going so far as to argue that BCRA's source limitation on the *funding* of electioneering communications actually "bans" speech. NRA Br. 3; ACLU Br. 2-3; see also McConnell Br. 38 ("draconian restrictions"); Business Pls. Br. 5 ("sweeping ban"). As the district court recognized, that argument is refuted by this Court's decisions. See Supp. App. 62sa (per curiam). As this Court reiterated in June, Section 441b—which Congress amended in enacting Title II of BCRA—does not "ban" any speech, but instead merely limits the manner in which a corporation or labor union may *finance* certain speech. See *Beaumont*, 123 S. Ct. at 2211 ("NCRL is simply wrong in characterizing § 441b as a complete ban."); accord *Austin*, 494 U.S. at 660; *NRWC*, 459 U.S. at 201; *MCFL*, 479 U.S. at 255; *Pipefitters*, 407 U.S. at 416-418. Thus, to be clear, corporations and labor unions are "free to fund as many [electioneering communications covered by BCRA § 201] as they desire from their separate segregated fund." Supp. App. 792sa n.113 (Kollar-Kotelly).[41]

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[41] The Business Plaintiffs proclaim (Br. 5) that, "[i]ncredibly, BCRA would forbid corporations to so much as mention President Bush, Vice President Cheney, or their Democratic rivals in broadcasts on the major television or radio stations in Washington, D.C., New York City, St. Louis, Chicago, and elsewhere during much of 2004!" In fact, the Business Plaintiffs may air all the electioneering communications that they would like during 2004 or any other election cycle by simply establishing a separate segregated fund and financing the communications with money from that fund as opposed to their general treasuries. In addition, the FEC has promulgated a regulation providing that the geographic and time limits of BCRA § 201 apply separately leading up to presidential primaries in each individual State. 11 C.F.R. 100.29(b)(3)(ii). And of course, under FECA, the Business Plaintiffs have for decades been required to fund advertisements that expressly advocate for a candidate through a PAC.

As this Court recognized in *Beaumont*, 123 S. Ct. at 2203, although it must register and disclose its activities, such a separate segregated fund, or PAC, "may be wholly controlled by the sponsoring corporation, whose employees and stockholders or members generally may be solicited for contributions." 123 S. Ct. at 2203-2204; see *NRWC*, 459 U.S. at 200 n.4, 201. Moreover, far from simply requiring "an act of institutional ventriloquism," NRA Br. 25, "[t]he PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members, and it lets the government regulate campaign activity through registration and disclosure without jeopardizing the associational rights of advocacy organizations' members." *Beaumont*, 123 S. Ct. at 2211 (citations omitted); see also *California Med. Ass'n*, 453 U.S. at 196.[42]

b. The NRA argues (Br. 25) that requiring it "to speak through its PAC will necessarily reduce the collective voice of its four million members to a whisper." But the NRA is free to solicit funds from its members, see 2 U.S.C. 441b(b)(4)(C); this Court has recognized that nonprofit advocacy organizations such as the NRA are quite adept in amassing such funds, see *Beaumont*, 123 S. Ct. at 2209-2210 & n.6; and, indeed, in 2000, the NRA's separate segregated fund spent almost $17 million to influence federal elections. See <<http://www.fec.gov/press/053101pacfund/tables/pacdis00.htm.>>; see also *NCPAC*, 470 U.S. at 493 (discussing influence of other nonprofit PACS). Nor, as plaintiffs suggest, can the costs of establishing a separate

[42] What is more, corporations that meet the requirements of the exception established by this Court in *MCFL* (see 479 U.S. at 263-264) may engage in *unlimited* independent spending in connection with federal elections—including with respect to making electioneering communications—without even having to form and operate through a separate segregated fund. See p. 77, *supra*.

segregated fund be overstated, as not just the NRA but every nonprofit corporation whose challenge this Court has reviewed, including MCFL, has established such a fund.

Moreover, organizations such as the NRA should not be allowed to have it both ways. If they are really so pervasively political that the establishment of a separate segregated fund would be superfluous, then contributions to an expressly political fund will not dry up and reduce their voice to a "whisper." NRA Br. 25. To the extent that the members of an organization such as the NRA decline to contribute money to a separate fund devoted to electioneering activities, that only underscores that some members may look to the organization for non-political benefits and thus highlights the concern—which the Court reiterated in *Beaumont*—that some corporations may seek to exploit the advantages of the corporate form and amass wealth for the purpose of exerting political influence that is "quite possibly at odds with the sentiments of some shareholders or members." 123 S. Ct. at 2211.

c. In addition to the option of acting through a separate segregated fund, individuals who are affiliated with corporations or labor unions remain free to use their own funds for electioneering communications. Cf. *Beaumont*, 123 S. Ct. at 2210 n.8 ("A ban on direct corporate contributions leaves individual members of corporations free to make their own contributions, and deprives the public of little or no material information."). The "First Amendment speech and association interests" of corporations and labor unions "are derived largely from those of their members and of the public in receiving information." *Ibid.* (citing *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 458-459 (1958), and *Bellotti*, 435 U.S. at 777). The First Amendment interests of corporations and labor unions to finance electioneering communications from funds amassed in their general coffers are thus necessarily limited by the fact that the individuals who own

and operate those entities are free to fund and otherwise engage in such speech without restriction.

In a similar vein, this Court has observed that, "[i]n return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they have as individuals." *NCPAC*, 470 U.S. at 495. The Court in this case should reject plaintiffs' demands that they are in effect entitled under the Constitution to the best of both worlds—the special advantages of the corporate form, *plus* the freedom to finance electioneering communications without having to take the minimal—but for the sake of preventing corruption vital—step of doing so through a separate segregated fund.

d. Finally, the separate segregated fund option reinforces the narrow tailoring of BCRA's limitations on funding "electioneering communications" in yet another dimension. To the extent that corporate or union funds are spent on electioneering communications, there is a legitimate interest in public disclosure of the individuals who are behind that electioneering activity. Requiring disclosure of a corporation's—and especially a nonprofit organization's—membership list, however, risks associational freedoms. Accordingly, as this Court in *Beaumont* recognized, the use of separate segregated funds furthers associational freedoms by allowing for disclosure of the funding sources of political activity without necessitating disclosure of an organization's underlying membership. See 123 S. Ct. at 2211. Indeed, many nonprofit corporations would presumably voluntarily adopt an arrangement similar to the separate segregated fund to protect their members' associational interests. That fact only underscores that the costs of a segregated-fund option are minimal and the option to operate through such a fund is a uniquely tailored response to the challenges of regulating corporate and union electioneering.

2. *Neither* Buckley *Nor* MCFL *Adopted The Express-Advocacy Test As An Absolute Limit On Congress's Authority*

Plaintiffs suggest that *Buckley* and *MCFL* erected an inalterable First Amendment rule "that the government may constitutionally regulate only independent expenditures for speech expressly advocating the election or defeat of a candidate, known as 'express advocacy.'" McConnell Br. 40; see *id.* at 12, 40-45; ACLU Br. 25-33. The district court properly rejected that argument. See Supp. App. 782sa, 788sa-799sa (Kollar-Kotelly); *id.* at 1147sa (Leon).

Certainly nothing in *Buckley* imposes such a categorical constitutional restraint on Congress's "well-established" authority to regulate federal elections. 424 U.S. at 13. In adopting an express-advocacy requirement, the Court in *Buckley* was not expounding on such first principles; it was resolving plaintiffs' argument that the former 18 U.S.C. 608(e)(1)'s use of the phrase "relative to" was "unconstitutionally vague." 424 U.S. at 40-41.

In the key passage of the opinion, the Court explained that "[t]he use of so indefinite a phrase as 'relative to' a candidate fails to clearly mark the boundary between permissible and impermissible speech." *Buckley*, 424 U.S. at 41. After concluding from the statutory context that "the phrase 'relative to' a candidate [should] be read to mean 'advocating the election or defeat of' a candidate," the Court observed that the distinction drawn by the statute "between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Id.* at 42. Therefore, "in order to preserve the provision against invalidation on vagueness grounds," the Court held that "§ 608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." *Id.* at 44 (emphasis added). In an

accompanying footnote, the Court further opined that "[t]his construction would restrict application of § 608(e)(1) to communications containing [certain specified] express words of advocacy." *Id.* at 44 n.52.

MCFL confirms that reading of *Buckley*. In that case, the Court was required to construe the meaning of Section 441b's "definition of an expenditure," and in particular "the phrase 'to any candidate . . . in connection with any election.'" 479 U.S. at 248. Relying on *Buckley*, the plaintiff argued that that definition "necessarily incorporate[d] the requirement that a communication 'expressly advocate' the election of candidates." *Ibid.* The Court agreed with the plaintiff that Section 441b's definition of expenditure "require[d] a similar *construction*" as the similar phrase at issue in *Buckley*. *Id.* at 249 (emphasis added). But here again, in adopting that "construction," the Court in no way laid down the express-advocacy requirement as an absolute constitutional barrier on how far Congress may go in regulating such expenditures when, as in BCRA, it chooses to do so in more specific terms.

When the Court adopts a saving construction of a statute that is amenable to such a construction, the Court by no means forecloses Congress from devising a different or more carefully targeted legislative solution to a problem. Cf. *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 374 (1971) (plurality). Indeed, the whole point of the avoidance cannon is that it *avoids* the need to fix the constitutional line definitively in circumstances in which Congress may not have intended to implicate a constitutional question. If Congress later clarifies its intent, then, and only then, is the constitutional issue ripe for adjudication. That is particularly true when, as here, Congress revisits an area to devise a solution to a problem that has developed in the decades since this Court adopted a saving construction of a different statutory provision in a prior case.

At the same time, it would be bizarre to conclude that the Constitution permits Congress to prohibit the use of corporate or union general treasury funds for electioneering advertisements, but that the *only* standard that it can constitutionally use (express advocacy) is one that misses the vast majority (88.6 percent) of advertisements that candidates themselves use for electioneering. See pp. 82-83, *supra*. That uncontroverted evidence strongly indicates that express advocacy is not an accurate proxy for identifying advertisements that are designed to influence elections or will have that effect, much less a standard that—as plaintiffs argue—is constitutionally enshrined. More to the point, nothing in *Buckley* or *MCFL* consigns Congress—or this Court—to such an impractical and inflexible constitutional rule.

3. *The Primary Definition Of "Electioneering Communications" Is Not Overbroad*

Plaintiffs argue that BCRA's primary definition of "electioneering communications" is unconstitutionally overbroad. See McConnell Br. 50; NRA Br. 33. But to the extent that the doctrine of overbreadth applies at all in the circumstances here, plaintiffs have not met the heavy burden necessary to justify facial invalidation of Title II.

a. "[O]verbreadth is an exception to [the] normal rule regarding the standards for facial challenges," which the Court has provided "out of concern that the threat of enforcement may deter or 'chill' constitutionally protected speech." *Virginia* v. *Hicks*, 123 S. Ct. 2191, 2196 (2003); see *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611 (1973). While, when properly applied, the overbreadth doctrine ensures First Amendment breathing room, the Court has stressed that its application also imposes "substantial societal costs." *Hicks*, 123 S. Ct. at 2197. For example, overbreadth challenges may "block[] application of a law to constitutionally

unprotected speech," *ibid.*, and considering a statute's hypothetical application to situations before they even arise can lead to "unnecessary pronouncement on constitutional issues," *United States* v. *Raines*, 362 U.S. 17, 22 (1960).[43]

The Court accordingly has emphasized that "the overbreadth doctrine * * * is, manifestly, strong medicine," which "has been employed by the Court sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613; see *Hicks*, 123 S. Ct. at 2196-2197; see *Ashcroft* v. *ACLU*, 535 U.S. 564, 584 (2002) (plurality); *Hill* v. *Colorado*, 530 U.S. 703, 731 (2000); *New York* v. *Ferber*, 458 U.S. 747, 769 (1982). Overbreadth challenges may succeed only on a showing that the law's overbreadth is "'*substantial*,' not only in an absolute sense, but also relative to the scope of the law's plainly legitimate applications." *Hicks*, 123 S. Ct. at 2197 (quoting *Broadrick*, 413 U.S. at 613) (emphasis added); see *Ferber*, 458 U.S. at 771. In addition, "[t]he overbreadth claimant bears the burden of demonstrating, from the text of [the law] and from actual fact, that [such] substantial overbreadth exists." *Hicks*, 123 S. Ct. at 2198 (internal quotation marks omitted).

While the overbreadth doctrine is rarely invoked to begin with, this case is a particularly unusual candidate for its "strong medicine." In the typical overbreadth case, a statute clearly prohibits a category of *unprotected* speech and the concern is that that bar will chill *protected* speech. As discussed above, however, Title II of BCRA does not ban any speech; it simply limits the manner in which certain

[43] The hypothetical threat of criminal prosecution for violation of BCRA's source limit—to which plaintiffs repeatedly refer—is highly remote. Criminal prosecutions for violation of the prohibition on independent expenditures under Section 441b are unusual and require proof of a "knowing and willful" violation of the Act. 2 U.S.C. 437g(a)(5)(C). Plaintiffs have not cited any cases involving criminal prosecutions arising from corporate or union expenditures since the FEC was given civil enforcement authority over such provisions. See 2 U.S.C. 437d, 437g.

political activity may be *funded* by corporations and unions. See pp. 97-98, *supra*; *Hill*, 530 U.S. at 731 (rejecting overbreadth argument because, *inter alia*, the statute at issue "simply does not 'ban' any messages, and likewise it does not 'ban' any signs, literature, or oral statements"). Similarly, any alleged "chill" created by BCRA is much more remote than in the usual overbreadth case. Title II does not silence any speakers—or speech—but instead simply requires those who desire to engage in certain speech to finance it through a separate fund. Accordingly, plaintiffs' reliance on the overbreadth doctrine is fundamentally misplaced at the outset.

b. In any event, plaintiffs have not come close to meeting the heavy burden necessary to invalidate a statute for overbreadth. At most, plaintiffs—who have not submitted any empirical studies of their own in this case and instead have relied primarily on anecdotal evidence, Supp. App. 762sa (Kollar-Kotelly)—have shown that BCRA's definition of "electioneering communications" may apply to "genuine" issue advertisements in a few "marginal applications." *Ferber*, 458 U.S. at 770 n. 25 (citation omitted). Plaintiffs have not, however, shown that the definition is substantially overbroad—either in an "absolute sense," or "relative to the scope of the law's plainly legitimate applications." *Hicks*, 123 S. Ct. at 2197. Therefore, their overbreadth claim fails.

That conclusion follows naturally, if not necessarily, from the fact that, as explained above, BCRA's primary definition of "electioneering communications" is narrowly tailored to advance several different compelling government interests. See *Broadrick*, 413 U.S. at 611-612 (overbreadth doctrine is a "corollary" to the rule that a law that burdens protected expression must be "narrowly drawn" to address "compelling societal needs"). The fact that the narrow-tailoring requirement has been met should eliminate any basis for invalidating the statute on its face under the guise of "overbreadth." To the extent that the definition is not

perfectly tailored, the marginal applications that form the basis of plaintiffs' challenge arguably could be addressed on an as-applied basis, where a court would at least have the benefit of adjudicating the applicability of Title II to a concrete controversy.

c. The centerpiece of plaintiffs' overbreadth challenge is a post hoc analysis of a few advertisements that were broadcast before BCRA was enacted. See McConnell Br. 50-52; AFL-CIO Br. 6; NRA Br. 36. That analysis, however, depends on plaintiffs' own post hoc account of the *purpose* behind those advertisements. As discussed above, BCRA establishes clear criteria to guide organizations that truly seek to broadcast issue advertisements that are not disguised attempts to influence the election of federal candidates. The only basis for invalidating the statute on its face for overbreadth would be to conclude that in a substantial number of instances, organizations that seek to air legitimate issue advertisements would be unable to do so without triggering BCRA's definition and, further, that having to choose between airing such communications and funding them through a PAC somehow would impose an unconstitutional chill on such speech. That conclusion is entirely implausible. To avoid BCRA, an organization need only refrain from identifying a federal candidate in an issue advertisement or avoid the narrow window before the candidate's election or advertising in the candidate's district. Moreover, as discussed, this Court has recognized that the separate segregated fund imposes only minimal—and permissible—burdens for non-*MCFL* corporations.

In any event, even accepting plaintiffs' post hoc analysis, the *few* examples that they have culled from *hundreds* of political advertisements in the record spanning four different election cycles, see Krasno & Sorauf Expert Report App. (Spreadsheet: 2000 Formula), do not begin to establish the requisite cloak of *substantial* overbreadth. Moreover, when

these advertisements are examined within their electoral context, as is essential to understanding their underlying objectives, Supp. App. 732sa-733sa (Kollar-Kotelly); *id.* at 1311sa-1312sa (Leon), it is clear that even the most favorable examples that plaintiffs' lawyers could locate fail to advance their overbreadth claim. Even if plaintiffs' account of the advertisements' alleged *purpose* were taken at face value, it would not alter the fact that—based on the presence of the objective factors identified in BCRA § 201—the advertisements were just as likely to influence the outcome of the candidate elections in connection with which they were run as advertisements containing express advocacy.

For example, "Stabenow Death Tax," sponsored by the Michigan Chamber of Commerce, criticized then-Senate candidate Debbie Stabenow for her past votes against repeal of the estate tax. McConnell Br. 52, App. 3a. The advertisement ran from September 20, 2000, until a week before election day, Goldstein Expert Report Exh. L (2000 database), in one of the most closely contested Senate races of the year. Cook Political Report 85 (Oct. 25, 2000) (Cook Report). It is implausible to suggest that the advertisement was not likely or designed to influence the election.

Similarly, "Job," AFL-CIO Br. 6, ran from September 14 to October 6, 2000, in the districts of a dozen or so Members of Congress whose races were considered competitive by the political handicappers—nine were labeled as "toss-ups." Mitchell Decl., Exhs. 1, 101-102; Cook Report 42-43. The advertisements criticized the targeted legislators for already having voted in June 2000 "to block federal safety standards that would help protect workers," and culminated in a plea to voters to tell the candidates that "[their] politics cause[] pain." Mitchell Decl., Exh. 141.

"No Two Way" criticized Representatives for voting *in 1995* "with Newt Gingrich to cut college loans, while giving tax breaks to the wealthy," Mitchell Decl., Exh. 59, yet ran

in September 1996, Mitchell Decl., Exhs. 1, 43-47, at the height of the AFL-CIO's advertising campaign to unseat the Republican majority in the House of Representatives. See Supp. App. 678sa-685sa (Kotelly); *id.* at 1316sa-1320sa (Leon). Given that those broadcasts ran long after-the-fact and at the height of hotly contested elections whose outcome might determine control of Congress but not the outcome of the particular legislative issues addressed, it is unimaginable that the advertisements were not intended to or did not have the effect of influencing candidate elections.

The NRA's claim that its "infomercials" were not likely to influence candidate elections does not square with the record. Indeed, the NRA's Executive Vice President, Wayne La Pierre, declared that the NRA had "no more important political objective" in 2000 than defeating Al Gore, and that it "spent what it took" to achieve that objective. LaPierre Dep. 84, 98; see also *id.* at 55, 85-86, 93-96, 101-113; Supp. App. 693sa-697sa (Kollar-Kotelly); *id.* at 1324sa (Leon). That objective is plain, for example, in "Tribute," NRA Br. 41 n.33, in which former NRA President Charlton Heston declares that the NRA's return "spells very serious trouble for a man named Gore," and defines the NRA's mission as "winning in November." NRA App. 946-947; see Supp. App. 752sa n.104 (Kollar-Kotelly).[44]

[44] The remaining broadcasts cited by the NRA include the March 2000 advertisements it ran in answer to televised remarks by President Clinton. Those advertisements would not have been regulated under BCRA because, as the NRA concedes, President Clinton was not a candidate for office in 2000. NRA Br. 38-39; see Supp. App. 748sa (Kollar-Kotelly). The NRA also refers to its 1994 advertisements urging viewers to "Call your congressman" to oppose President Clinton's crime bill, and those criticizing the Brady Bill (Br. 36-37), but offers no evidence that these advertisements were broadcast within BCRA's 30-or 60-day window. LaPierre Decl. ¶ 21; NRA App. 885-888; see Supp. App. 748sa (Kollar-Kotelly). Likewise, "Banned in Canada" ran in 1999, when "no election was looming," NRA Br. 41-42 n.33, so it, too, would not have been

At the same time, a closer examination of the allegedly "genuine" issue advertisements touted by plaintiffs simply underscores the wisdom of the objective criteria selected by Congress for defining the "electioneering communications" subject to BCRA. As Judge Kollar-Kotelly explained, although plaintiffs "rely on their own self-serving testimony and self-selected advertisements they claim are pure issue advertisements, * * * BCRA's primary definition of electioneering communications presents an empirical test that ignores this type of self-serving *ex post facto* rationalization by focusing on purely objective criteria." Supp. App. 745sa. That is the test that Congress—whose Members are the veterans of federal campaigns and thus are well aware of what constitutes electioneering—determined was best.[45]

d. Plaintiffs erroneously assert that "defendants relied almost exclusively on two reports by the Brennan Center for Justice," the *Buying Time* studies. McConnell Br. 53-54. Although plaintiffs focus their attacks on *Buying Time* studies, in fact the reports represent only a portion of the evidence that was placed in the record to show that BCRA's primary definition of "electioneering communications" is carefully targeted to capture issue advertisements that are likely to influence the outcome of federal candidate elections. Moreover, the *Buying Time* reports contain both (i) objective findings on matters such as when and where certain advertisements were run in connection with recent federal

subject to regulation under BCRA's primary definition of "electioneering communications."

[45] Underscoring the lengths to which plaintiffs have gone to try to create an impression of overbreadth, the ACLU (Br. 11) cites the only electioneering communication that it has *ever* sponsored, which, the district court found, "was clearly designed simply to provide the corporation standing to challenge BCRA." Supp. App. 748sa-751sa (Kollar-Kotelly); see *id.* at 1368sa-1369sa (Leon).

elections, and (ii) a subjective analysis of the "genuine" or "electioneering" *purpose* of certain advertisements.

As Judge Kollar-Kotelly explained, "much, if not all, of the objective findings in the *Buying Time* reports have not been undermined by Plaintiffs' expert." Supp. App. 856sa. For example, plaintiffs did not challenge the objective conclusions in the *Buying Time* studies that use of the express advocacy terminology or reference to a candidate outside the 60-day period before a general election is rare; that interest group advertisements that identify candidates are concentrated toward the end of the election campaign; or that such advertisements are overwhelmingly run in a small number of competitive districts. See *ibid.*; Defs.' D. Ct. Reply Br. 69-71 (summarizing undisputed record facts).[46]

Rather, plaintiffs' criticism of the *Buying Time* studies has focused on the *subjective* aspect of the reports, which sought to determine whether the purpose of advertisements was to influence federal elections. That aspect of the *Buying Time* studies is less telling than the objective findings on which Congress based in part the criteria specified in BCRA § 201 because, as discussed, such an analysis does not answer the more important question of whether, or to what extent, BCRA's definition of electioneering communications will impermissibly chill protected expression on a *prospective* basis. See Supp. App. 858sa (Kollar-Kotelly) (The "subjective nature of the effort of trying to capture mental impressions

[46] Plaintiffs contend that the district court "*unanimously* rejected the conclusions of the *Buying Time* reports." McConnell Br. 53 (emphasis in original). In fact, however, Judge Kollar-Kotelly specifically emphasized that plaintiffs had not controverted the "objective findings in the *Buying Time* reports." Supp. App. 856sa. Judge Leon also accepted many of the studies' objective findings, see *id.* at 1356sa-1359sa (discussing Goldstein Expert Report, which was based on essentially the same database as *Buying Time* studies), and found that even the subjective analysis of "the *Buying Time* studies are entitled to some evidentiary weight." *Id.* at 1154sa; see *id.* at 1339sa-1340sa.

of viewers" illustrates "why BCRA's framers have used objective criteria to 'electioneering communication.'").

In any event, the subjective analysis in the *Buying Time* reports ultimately bolsters the conclusion that BCRA's definition is not substantially overbroad. Indeed, using the 1998 formula, analysis of the data underlying the *Buying Time* reports leads to the conclusion that only 6.1 percent of genuine issue advertisements that aired in 1998 would have been captured post hoc by BCRA § 201, and 3.14 percent of genuine issue advertisements that aired in 2000. See Supp. App. 1056sa-1057sa (Kollar-Kotelly).

The 1998 formula measures overbreadth in the "absolute sense," *Hicks*, 123 S. Ct. at 2197, in that it compares the number of genuine issue advertisements broadcast that meet BCRA's definition (numerator) with the number of *all* genuine issue advertisements aired in a calendar year (denominator). The 2000 formula used in the *Buying Time* studies uses the same numerator but compares it with the number of all aired advertisements *captured by BCRA's definition.* Because the denominator in the 2000 formula combines both genuine issue *and* electioneering advertisements run within 60 days of a general election, it results in a calculation that may vary significantly depending on the volume of electioneering advertisements in a calendar year. See Krasno & Sorauf Expert Report App. & Spreadsheets; Goldstein Expert Report 25 (Tbl. 7).

Plaintiffs assert that "defendants' experts and the [*Buying Time*]'s authors now concede that the underlying data [for the 1998 report] demonstrates that 14.7% of the ads that would have been prohibited by BCRA were 'genuine.'" McConnell Br. 55. That figure, however, is based on the 2000 formula, which measures the percentage of advertisements regulated by BCRA that are genuine, as opposed to the more absolute comparison undertaken by the 1998 formula. Using the 1998 formula, the 14.7 percent figure drops to

around six or seven percent of all genuine issue advertisements aired in the year 1998. A definition that captures only six or seven percent of the genuine issue advertisements broadcast in 1998 is not substantially overbroad.[47]

e. Plaintiffs argue that Title II is overbroad because it does not expressly exempt "'*MCFL*' corporations." McConnell Br. 57; see NRA Br. 34-36 & n.29. BCRA § 204 (the Wellstone Amendment) applies the source limitation on electioneering communications to nonprofit organizations established under Section 501(c)(4) and Section 527(e)(1) of the Internal Revenue Code. See BCRA §§ 203, 204; Supp.

[47] Plaintiffs argue that "if the data [in the 2000 report] had been correctly analyzed, 17% of the ads that referred to candidates in the last 60 days of the 2000 campaign were 'genuine' issues ads." McConnell Br. 56. That figure, however, was calculated by one of defendants' experts at a deposition based on an *erroneous* premise—that five of the six advertisements in the year 2000 database which had been coded by the authors of the *Buying Time* reports as "electioneering" should have been recoded "genuine" (even though they had been originally coded "electioneering" by students). When the figure is calculated with the five advertisements properly coded as "electioneering" rather than "genuine," the overbreadth figure is properly reduced to around two to three percent. See Goldstein Cross-Exam. 144-145, 151-152, 160; Goldstein Rebuttal Report 16. Moreover, as Judge Kollar-Kotelly explained, even "accept[ing] the 17 percent figure as a valid metric for determining overbreadth," it would not render the definition "substantially overbroad." Supp. App. 859sa-860sa. Rather, "any such impact of BCRA is substantially counterbalanced by the record in this case and the objective empirical determinants related to these advertisements." *Id.* at 860sa.

Plaintiffs also argue that, in the 1998 report, certain advertisements were improperly recoded by the authors as "electioneering," and that if those advertisements had not been recoded, the 1998 report would have concluded (using the 2000 formula) that "64% of ads mentioning a candidate in the 60 days before the 1998 general election were coded by students as 'genuine.'" McConnell Br. 56. The advertisements at issue, however, were recoded to account for the fact that the students had given internally inconsistent responses with respect to the advertisements; even plaintiffs' own expert concluded that he would have recoded the advertisements under those circumstances. See Gibson Cross Tr. 120-121; Defs.' D. Ct. Reply Br. 74-76.

App. 65sa (per curiam). Although BCRA § 204 does not expressly address *MCFL* corporations, the "well-settled presumption" is "that Congress understands the state of existing law when it legislates." *Bowen* v. *Massachusetts*, 487 U.S. 879, 896 (1988). Nor in light of the Court's treatment of statutes that similarly lacked a specific exception for nonprofits in *MCFL* and *Austin* would Congress have perceived any necessity in expressly carving out "*MCFL* corporations." In addition, the FEC's regulations implementing BCRA, just like its pre-BCRA regulations implementing 2 U.S.C. 441b, specifically exempt *MCFL*-type corporations from Title II's source limitation. See 11 C.F.R. 114.10.

The district court concluded that BCRA § 204 would be unconstitutional as applied to nonprofit corporations that meet the criteria specified in *MCFL*. See *MCFL*, 479 U.S. at 264; Supp. App. 865sa-872sa & n.139 (Kollar-Kotelly); *id.* at 1166sa-1169sa (Leon). The government has not challenged that ruling. 02-1676 J.S. 24 n.8. The NRA (Br. 21-22) and ACLU (Br. 34-37)—both of which elect to receive corporate contributions, see NRA Br. 3; ACLU Br. 17 n.12—urge the Court to *expand* the *MCFL* exception to cover *any* Section 501(c)(4) corporation, not just those that meet the criteria specified in *MCFL*. That argument is out of place in this case and, in any event, should be rejected. See Supp. App. 871sa (Kollar-Kotelly); p. 88 & note 38, *supra*. Indeed, as this Court recognized in *Beaumont*, nonprofit corporations that "qualify for favorable tax treatment under § 501(c)(4)," including the NRA, are among "the Nation's politically powerful organizations." 123 S. Ct. at 2209.

f. Lastly, it is significant that, although plaintiffs go to extraordinary lengths in attempting to show that BCRA's definition of "electioneering communications" is imperfect at its margins, they have never proposed a better test for identifying such communications other than claiming that it is necessary to adhere to the express-advocacy test. As dis-

cussed, the uncontroverted evidence shows that the express advocacy test is a grossly inaccurate proxy for identifying electioneering communications. Indeed, nearly 90% of the advertisements that federal candidates themselves aired in 2000 did not contain express advocacy, though presumably *all* of them were designed to influence their own election. See pp. 82-83, *supra*. The overbreadth doctrine provides no basis for invalidating Congress's definition of "electioneering communications" in BCRA and limiting federal regulation of the source-of-funding for electioneering advertisements to the blunt proxy of the express-advocacy test.

4. *The Primary Definition Of "Electioneering Communications" Is Not Too Narrow*

a. Plaintiffs argue that the definition of electioneering communications is fatally *under*inclusive because it applies (FECA § 304(f)(3)(A)(i), 2 U.S.C. 434(f)(3)(A)(i)) only to advertisements run in broadcast media and not to advertisements run in other media, such as print. See McConnell Br. 61-62; ACLU Br. 37-41. That argument should be rejected. Congress's decision in BCRA to take the more limited step of focusing only on broadcast advertisements does not render the Act unconstitutional. See *MCFL*, 479 U.S. at 258 n.11 (Congress may proceed in the area of campaign finance in a "cautious advance, step by step."); *Buckley*, 424 U.S. at 105 ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."). Moreover, as a general matter, broadcast media have historically been subjected to much greater federal regulation than print media.

Two considerations in particular support Congress's decision to take a more limited approach here. First, "[t]he uncontroverted testimony of experts and political consultants is that broadcast advertising is the most effective form of communicating an electioneering message." Supp. App. 879sa (Kollar-Kotelly); see *id.* at 876sa. Second, broadcast time is more expensive than space in other media. Indeed, the increased cost of airing advertisements on television and radio is one of the principal causes of the escalating costs of the modern political campaign for federal office. As a result, broadcast advertisements are much more likely than other types of advertisements to cause the fact or appearance of the "corrosive and distorting effects [that] immense aggregations of wealth" can inflict on the electoral process. *Austin*, 494 U.S. at 660; see also 145 Cong. Rec. S511 (daily ed. Jan. 19, 1999) (statement of Sen. Snowe) (broadcast advertisements "constitute the most blatant form of [unregulated] electioneering").[48]

b. The NRA likewise argues that the definition of "electioneering communications" is impermissibly narrow because it excludes "communication[s] appearing in a news story, commentary, or editorial distributed through the facilities of any broadcast station." BCRA § 201(a). In *Austin*, however, the Court expressly rejected a challenge to a state law modeled on 2 U.S.C. 441b that contained the same type of media exception from the restriction on corporate independent expenditures. 494 U.S. at 655 n.1, 666-668. As the Court explained, "[a] valid distinction * * * exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public." *Id.* at 668. And, the Court held, the "press' unique societal role * * *

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[48] The newspaper-tax cases relied upon by the ACLU are inapposite. See ACLU Br. 40-41 (citing, *e.g.*, *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Rev.*, 460 U.S. 575 (1983)). BCRA does not impose any tax on any media outlet and therefore does not implicate any of the special concerns involving "taxation of the press." *Minnesota Star*, 460 U.S. at 585. Moreover, unlike the selective treatment involved in *Minnesota Star*, see *id.* at 593, there is ample justification for Congress's decision to focus on broadcast media as opposed to other media in enacting BCRA.

provide[s] a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations." *Ibid.* Nothing has changed either in this Court's case law or in the role of the media since *Austin* that would warrant revisiting much less overturning that holding of *Austin*. See Supp. App. 883sa-884sa (Kollar-Kotelly).

5. *BCRA's Fallback Definition Of "Electioneering Communications" Is Valid*

Plaintiffs attack BCRA's fallback definition of "electioneering communications" on the ground that it is unconstitutionally vague. See McConnell Br. 57-61; AFL-CIO Br. 24- 33. Judge Leon—who wrote the controlling decision on the issue for the district court—held that the fallback definition of "electioneering communications" is constitutional except for its final clause, which further specifies that a covered communication must be "suggestive of no plausible meaning other than an exhortation to vote." BCRA § 201(a) (adding FECA § 304(f)(3)(A)(ii)); see Supp. App. 1159sa-1166sa (Leon); *id.* at 885sa-886sa (Kollar-Kotelly). But Judge Leon concluded that the final clause "can be excised" and upheld the backup definition as so modified. *Id.* at 1165sa. If the Court concludes that the primary definition of "electioneering communications" is invalid, it should uphold BCRA's backup definition in its entirety.

"[T]he vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) (internal quotation marks omitted); see *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). But by no means does the mere possibility of imprecision render a law unconstitutionally vague. As this Court has observed, "[c]ondemned to the use of words, we can never expect mathematical certainty from our language," and "[i]t will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question.'" *Id.* at 110 & n.15; see also *United States* v. *Powell*, 423 U.S. 87, 93-94 (1975); *NRWC*, 459 U.S. at 211. The Court is especially reluctant to invalidate a law for vagueness when, as here, the vagueness challenge is made to a law *on its face*. See *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 580, 588-590 (1998); *Hill*, 530 U.S. at 733.

Nothing about the final clause of the definition is unconstitutionally vague. Indeed, that clause is designed to *protect* corporate and union speakers, and to *narrow* the reach of BCRA's restrictions on corporate and union expenditures, by reducing BCRA § 203's potential applicability to communications that are not in fact intended to affect federal elections. To the extent that there is any ambiguity in that last sentence, it is only a question of how much otherwise regulable electioneering speech Congress has voluntarily *forgone* addressing in an effort to avoid any conceivable chilling effect. Any degree of uncertainty in a standard designed to protect speech—like whatever uncertainty might remain about the exact contours of *New York Times* v. *Sullivan*'s "actual malice" standard—is not the kind of vagueness that should condemn a statute. Cf. *Schenck* v. *Pro-Choice Network of Western N.Y.*, 519 U.S. 357, 383-384 (1997) (rejecting First Amendment challenge to sidewalk-counselor exception to cease-and-desist order restricting certain demonstrations; "the entire exception for sidewalk counselors was an effort to enhance petitioners' speech rights, and the 'cease and desist' limitation must be assessed in that light") (citations omitted).

Judge Leon reasoned that "[w]hether an ad is suggestive of no plausible meaning other than an exhortation to vote depends on a number of variables such as the context of the campaign, the issues that are the centerpiece of the cam-

paign, the timing of the ad, and the issues with which the candidates are identified." Supp. App. 1164sa. The context in which the advertisement is broadcast is indeed important. But that does not mean that a corporation or labor union preparing to broadcast such an advertisement would have any difficulty in determining—based on its understanding of the context in which its own advertisement will be aired—whether that communication is reasonably capable of no other meaning than an exhortation to vote for or against a specific candidate. See *FEC* v. *Furgatch*, 807 F.2d 857, 864 (9th Cir.) (construing FECA's express-advocacy test to apply to communications that do not contain *Buckley*'s magic words, but are "susceptible of no other reasonable interpretation but as an exhortation to vote for or against a specific candidate"), cert. denied, 484 U.S. 850 (1987).[49]

As Judge Leon himself concluded, plaintiffs' vagueness challenge to the other terms of the backup definition similarly lacks merit. See Supp. App. 1163sa-1164sa. In considering that challenge, Judge Leon properly refused to follow the deposition testimony cited by plaintiffs (see McConnell Br. 58-60) based on their own pop quiz of certain witnesses, during which plaintiffs refused to answer the witnesses' requests to supply them with additional information concerning the context in which the advertisement was

[49] Although BCRA's backup definition does not incorporate the specific, objective criteria included in BCRA's primary definition of "electioneering communications," it is nonetheless akin to other First Amendment standards that omit such express criteria and instead use an objective "reasonable person" or "ordinary observer" standard. See *Ashcroft* v. *ACLU*, 535 U.S. at 246; *County of Allegheny* v. *ACLU*, 492 U.S. 573, 599-600 (1989); see also *Zelman* v. *Simmons-Harris*, 536 U.S. 639, 655 (2002) (a reasonable observer must be deemed to be aware of the "history and context" of the program at issue); *Greenbelt Coop. Publ'g Ass'n* v. *Bresler*, 398 U.S. 6, 14 (1970). Moreover, the traditional vagueness inquiry itself must be undertaken from the standpoint of a reasonable person—presumed to be aware of the world around him.

aired (which a corporation or union determining whether an advertisement is covered by the backup definition would have). See Defs.' D. Ct. Opp. Br. 95 & n.103 (citing depositions). Disagreement over whether a particular advertisement falls within the backup definition suggests only that a communication may be susceptible to more than one interpretation, not that the statute's *definition* is unconstitutionally vague. The backup definition itself makes clear that if a communication is susceptible to more than one reasonable interpretation, it is not covered.

D. BCRA's Disclosure Requirements With Respect To Electioneering Communications Are Valid

BCRA § 201 amends FECA § 304 (2 U.S.C. 434) to require any person who makes a disbursement for the direct costs of producing or airing "electioneering communications" in an aggregate of more than $10,000 in a calendar year to disclosure certain information to the FEC. See Supp. App. 66sa-67sa (per curiam). That provision simply updates the requirements that have long applied to express advocacy, and were upheld in *Buckley*, to reflect BCRA's adjustment of Section 441b to apply to "electioneering communications." In fact, BCRA's disclosure provisions are *less* intrusive than the disclosure requirements for independent expenditures that have long applied under 2 U.S.C. 434(c). Whereas that provision requires groups making independent expenditures to identify each of their donors contributing over $200 and to file disclosure reports for expenditures exceeding $250, 2 U.S.C. 434(c)(2)(C), BCRA's new requirements apply only to each of their donors contributing over $1000 and do not require disclosure at all until $10,000 has been spent. FECA § 304(f)(2)(E) (2 U.S.C. 434(f)(2)(E)).

The district court sustained BCRA § 201's disclosure provisions in principal part, see Supp. App. 106sa-128sa (per curiam), emphasizing that "[t]he factual record demonstrates

that the abuse of the present law not only permits corporations and labor unions to fund broadcast advertisements designed to influence federal elections, but permits them to do so while concealing their identities from the public," *id.* at 106sa; see also *id.* at 675sa-677sa (Kollar-Kotelly). That ruling is unassailable.

This Court has recognized that disclosure laws in the campaign-finance context serve several compelling interests. First, laws requiring disclosures concerning the sources of financial support "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." *Buckley*, 424 U.S. at 67. Second, "[d]isclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity." *Ibid.* Third, "recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of [campaign finance laws]." *Id.* at 67-68. BCRA's disclosure requirements directly advance each of those interests.

The ACLU argues (Br. 41-46) that BCRA § 201's disclosure provisions impermissibly chill speech and violate its "right to anonymous political speech and association." *Id.* at 42 (citing, *e.g.*, *NAACP* v. *Alabama ex rel Patterson*, 357 U.S. 449 (1958)). In *Buckley*, however, this Court rejected a similar challenge to FECA's disclosure provisions, holding that electioneering "disclosure requirements, as a general matter, serve substantial government interests" and "appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." See 424 U.S. at 68; see *id.* at 66-68 (discussing the important government interests served by FECA's recordkeeping and disclosure requirements). As the district court found, BCRA's disclosure requirements directly advance the same interests given the number of organizations that have

financed electioneering communications but sought to conceal their identities through the use of misleading or nondescript pseudonyms. See Supp. App. 118sa (per curiam); see also *Citizens Against Rent Control* v. *Berkeley*, 454 U.S. 290, 298 (1982) ("[W]hen individuals and corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source.").

In *Buckley*, this Court also held "that *NAACP* v. *Alabama* is inapposite where * * * any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative." 424 U.S. at 70. Instead, the Court held, to implicate the concerns identified in that case, the plaintiffs must establish "a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either government officials or private parties." *Id.* at 74; see *ibid.* ("The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself."). In this facial challenge, as in *Buckley*'s, plaintiffs have failed to meet that evidentiary burden. Indeed, as the district court explained, "the ACLU has presented the Court with no facts that place it in the same category of threatened associations such as the NAACP." Supp. App. 122sa (per curiam).

The district court concluded that BCRA § 201 is invalid insofar as it requires disclosure of executed contracts for electioneering communications that have not yet been publicly distributed. See Supp. App. 107sa-116sa (per curiam); see 2 U.S.C. 434(f)(5) (added by BCRA § 201) ("For purposes of this subsection, a person shall be treated as having made the disbursement if the person has executed a contract to make a disbursement."). That holding is erroneous. Because the time and location of the actual broadcast is an element of BCRA's definition of electioneering communication, the

FEC has interpreted the provision at issue not to require disclosure until after "the date on which a communication is publicly distributed." 67 Fed. Reg. 64,555, 64,656 (2002). But even assuming that new FECA § 304(f)(5) might sometimes have the effect of requiring that contracts be disclosed before public distribution of an electioneering communication, that requirement would neither prevent any person from speaking nor require disclosure of the specific content of any advertisement. Indeed, under the pre-BCRA regime the definition of "expenditure" included a "written contract, promise, or agreement to make an expenditure." 2 U.S.C. 431(9)(A)(ii); see 11 C.F.R. 104.11(b).[50]

E. The District Court Correctly Dismissed Plaintiffs' Challenges To BCRA § 214(a)-(c)

Federal law has long provided that expenditures made "in cooperation, consultation, or concert with, or at the request or suggestion of," a federal candidate will be treated as contributions to the candidate's campaign. 2 U.S.C. 441a(a)(7)(B)(i); see p. 17, *supra*. In December 2000, the FEC revised its regulations defining the circumstances under which election-related expenditures will be treated as "coordinated" with a candidate or party committee. See 65 Fed. Reg. 76,138 (2000); 11 C.F.R. 100.23 (2002). Evidently concluding that the FEC had redefined the concept of coordination in an unduly narrow way, see 148 Cong. Rec.

[50] BCRA § 311 amends FECA § 318 to impose additional requirements concerning the identification of sponsors of election-related advertisements, and to make the sponsorship-identification requirements applicable to "electioneering communications." Like the other disclosure requirements that BCRA imposes with respect to electioneering communications, BCRA § 311 furthers the government's interest in ensuring an informed electorate. Plaintiffs' challenge to BCRA § 311 is premised entirely on their contention that *Buckley* precludes Congress from imposing restrictions on speech that is not express advocacy. See McConnell Br. 38-45; Bus. Pls. Br. 32-33; Supp. App. 157sa-158sa (per curiam). That argument lacks merit for the reasons stated at pp. 101-104, *supra*.

S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain), Congress directed the agency to reconsider the matter. BCRA § 214(b) repeals the Commission's December 2000 coordination regulations, and BCRA § 214(c) requires the FEC to promulgate new regulations that "shall not require agreement or formal collaboration to establish coordination." In addition, BCRA § 214(a)(2) amends FECA § 315(a)(7)(B) to provide that expenditures made "in cooperation, consultation, or concert with, or at the request or suggestion of," a political party committee shall be considered contributions to that committee.

Plaintiffs challenged BCRA § 214, contending that it is unconstitutionally vague and that it reflects an unduly broad understanding of "coordination." In December 2002, while plaintiffs' claims were pending in the district court, the FEC promulgated new coordination rules in accordance with the statutory directive. See 68 Fed. Reg. 421 (2003). The district court rejected plaintiffs' challenge to BCRA § 214(a) and held that their challenge to BCRA § 214(b) and (c) is not justiciable in this facial challenge. See Supp. App. 134sa-156sa (per curiam); but see *id.* at 386sa-396sa (Henderson, dissenting). Those holdings are correct.

1. The text of BCRA § 214(a)(2) tracks the preexisting language of 2 U.S.C. 441a(a)(7)(B)(ii). As the district court observed, "this same definition has been applied to expenditures coordinated with political candidates for over 25 years and was recently found by [this] Court to apply to political party expenditures." Supp. App. 135sa-136sa (per curiam) (citing *Colorado II*, 533 U.S. at 467). "Plaintiffs have provided no explanation as to why the application of this coordination formula to the context of political parties chills political speech any more than when applied to expenditures coordinated with political candidates." *Id.* at 137sa. And by directing the FEC to promulgate new regulations addressing the subject of coordination, subject to judicial review if

necessary (see p. 124, *infra*), BCRA § 214(c) provides a mechanism for alleviating any uncertainty that regulated entities may feel regarding the scope of BCRA § 214(a). See Supp. App. 137sa-138sa (per curiam). Plaintiffs' vagueness challenge therefore lacks merit.

2. BCRA § 214(b) and (c) does not define the standard for determining when an expenditure is "coordinated" with a candidate or party, nor does it otherwise alter the plaintiffs' legal rights or obligations. Rather, the Act directs the expert agency to address the question of coordination in the first instance. Any impairment of plaintiffs' ability to engage in campaign-related activity is attributable to the FEC rules adopted in response to the statutory directive, not to BCRA § 214(b) and (c) on its face. The FEC has now promulgated the required regulations, which are subject to judicial review under the Administrative Procedure Act (APA). If plaintiffs believe that the rules promulgated by the FEC in December 2002 define coordination in an unconstitutionally broad (or otherwise improper) manner, their proper recourse is to file suit under the APA to challenge those regulations. In and of itself, however, BCRA § 214(b) and (c) causes plaintiffs no injury, and it therefore is not subject to challenge in this lawsuit.[51]

3. Plaintiffs contend that "agreement is *always* required before coordination can constitutionally be found," and that any FEC regulation that is consistent with BCRA § 214(b) and (c) would therefore necessarily violate the First Amend-

[51] As the district court observed, any plaintiff in an APA action challenging the FEC's coordination regulations could "seek a stay from the FEC or a court to prevent the application of the rule pending review." Supp. App. 156sa n.99 (per curiam) (citing 5 U.S.C. 705). There is consequently no basis for the McConnell plaintiffs' suggestion (Br. 65) that immediate review by this Court of their abstract constitutional challenge to BCRA § 214(b) and (c) is necessary in order to avoid hardship to regulated entities.

ment. McConnell Br. 65; see RNC Br. 78. FECA has long provided, however, that expenditures made "at the request or suggestion of" a candidate will be treated as contributions to that candidate. 2 U.S.C. 441a(a)(7)(B)(i). This Court has recognized that coordinated spending "covers a spectrum of activity," *Colorado II*, 533 U.S. at 445, including "wink or nod" arrangements, *id.* at 442. And while plaintiffs contend that BCRA § 214(b) and (c) effectively compels the FEC to promulgate coordination rules that violate the First Amendment, they have not filed suit to challenge the regulations that the Commission has actually adopted.[52]

III. PLAINTIFFS' CHALLENGES TO TITLES III AND V OF BCRA SHOULD BE REJECTED

A. The District Court Correctly Dismissed Plaintiffs' Challenges To The Increased Individual Contribution Limits In BCRA § 307

1. To establish Article III standing, a plaintiff must demonstrate an actual or imminent injury that is fairly traceable to the defendant's challenged conduct and is likely to be redressed by a favorable decision. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). The district court correctly held that the Adams plaintiffs lack standing to challenge BCRA § 307(a)(1), which increases from $1000 to $2000 the per-election limit on individual contributions to

[52] Plaintiffs' reliance (McConnell Br. 65) on *Abbott Labs.* v. *Gardner*, 387 U.S. 136 (1967), is misplaced. *Abbott Labs.* holds that an agency regulation may appropriately be made the subject of a judicial challenge, even before the rule has been applied to a discrete set of facts, if the regulation "is a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (citing *Abbott Labs.*). *Abbott Labs.* does not suggest, however, that a plaintiff may bring a facial challenge to a statutory provision that imposes no substantive obligation upon any private party, but simply requires the promulgation of rules by an Executive Branch agency.

federal candidates. See Supp. App. 472sa-475sa (Henderson); *id.* at 1008sa (Kollar-Kotelly).[53]

The Adams plaintiffs include both voters and potential federal candidates. See Adams Br. 2. BCRA § 307 allows those plaintiffs to make and receive *larger* contributions than were previously lawful. Plaintiffs' contention (Br. 2-3) that other donors and candidates will derive a greater practical benefit from the increase is far too speculative to establish actual or imminent injury. And even if plaintiffs had adequately alleged a likelihood of "actual or imminent" injury, their harm would not be "fairly traceable" to BCRA or to any action of the defendants. See Supp. App. 474sa (Henderson).

2. In any event, plaintiffs' equal protection claim lacks merit. Because plaintiffs themselves can now make and receive contributions up to the new $2000 limit, BCRA § 307 does not deny them any right or privilege that it confers on others. Plaintiffs' claim logically presumes that limits on individual contributions to federal candidates are constitutionally compelled—a proposition clearly belied by the absence of any such restrictions until 1974. And, having concluded that a contribution limit is appropriate, Congress has considerable discretion to choose and adjust the applicable

[53] Unlike the Adams plaintiffs, the Paul plaintiffs contend (Br. 46) that Congress should have *increased* the contribution limit applicable to political committees other than political parties, and that it should have indexed that limit for inflation. This Court lacks jurisdiction over that claim because it is in substance a challenge to the pre-existing FECA limit on contributions to non-party political committees, not to any provision of BCRA (which left that contribution limit unchanged). Challenges to the constitutionality of FECA are subject to direct review before an appropriate en banc court of appeals, see 2 U.S.C. 437h, not in the three-judge district court convened pursuant to BCRA § 403(a). In any event, Congress has broad authority to conclude that different types of organizations "may require different forms of regulation in order to protect the integrity of the electoral process," *California Med. Ass'n*, 453 U.S. at 201; see pp. 70-72, *supra*, and it did not exceed that authority here.

ceiling. Indeed, the Court in *Buckley* specifically noted that "a court has no scalpel to probe" whether a "$2000" or "$1000" cap would be preferable. 424 U.S. at 30.

B. The District Court Correctly Dismissed Plaintiffs' Challenge To The "Millionaire Provisions" Of BCRA §§ 304 And 319

1. The Adams plaintiffs also challenge BCRA §§ 304 and 319 (collectively referred to as the "millionaire provisions"), which allow congressional candidates to accept contributions that exceed the generally applicable FECA/BCRA limits in certain circumstances when the candidate faces an opponent who expends substantial personal funds on his own campaign. See BCRA § 304(a)(2) (Senate); BCRA § 319(a) (House of Representatives). Plaintiffs contend (Adams Br. 11-12) that non-wealthy candidates "whose supporters cannot make large donations" will be unable to compete on even terms in any future election in which their opponents include *both* a self-funded candidate *and* another candidate who receives contributions in excess of the general $2000 limit by invoking the "millionaire" provisions. The district court correctly held that plaintiffs lack standing to challenge BCRA §§ 304 and 319. See Supp. App. 475sa-477sa (Henderson); *id.* at 1008sa (Kollar-Kotelly).

Plaintiffs' claim of injury resulting from BCRA §§ 304 and 319 is even more speculative than their claim with respect to BCRA § 307. It is wholly uncertain whether any plaintiff will be a candidate in any election affected by the millionaire provisions. See Supp. App. 476sa (Henderson). And even if one of the plaintiffs becomes a candidate in such a race, the immediate consequence of BCRA §§ 304 and 319 (like that of BCRA § 307) would be to *increase* the amount of the money that could be contributed to his campaign. Plaintiffs' claim of harm depends not only on the uncertain prospect that a plaintiff candidate will face a self-funded opponent in an

upcoming federal election, but also on speculative predictions that a *third* candidate in the same race will qualify for and benefit significantly from the increased contribution limits provided by BCRA §§ 304 and 319, and that plaintiffs themselves will be unable to derive a comparable benefit. Even in that circumstance, any competitive electoral disadvantage that plaintiffs might suffer would not be attributable to BCRA or to the defendants. See p. 126, *supra*.

2. In any event, the millionaire provisions do not deprive plaintiffs of their right to equal protection of the laws. In any election where a self-funded opponent's expenditures trigger the higher contribution limits provided by BCRA §§ 304 and 319, plaintiffs themselves will have the same opportunity as any other donors and candidates to make and receive contributions in the increased amounts. The possibility that other donors and candidates will derive a greater practical advantage from the increased limits is insufficient to establish an equal protection violation. See p. 126, *supra*.

C. The District Court Correctly Dismissed Plaintiffs' Challenge To BCRA § 305

Under BCRA § 305, a candidate for federal office may invoke his statutory entitlement (see p. 19, *supra*) to the "lowest unit charge" for broadcast advertising only if he either (a) promises that his advertisements will "not make any direct reference to another candidate for the same office," or (b) makes clear, in any advertisement that does include a direct reference to an opposing candidate, that the sponsoring candidate has approved the broadcast. If the sponsoring candidate chooses option (b), BCRA § 305 prescribes the form in which he must state his approval of the advertisement. For television broadcasts, the advertisement must include "a clearly identifiable photographic or similar image of the candidate," and "a clearly readable printed statement" expressing the candidate's approval.

BCRA § 305(a)(3) (adding 47 U.S.C. 315(b)(2)(C)(i) and (ii)). For radio advertisements, the broadcast must include "a personal audio statement by the candidate that identifies the candidate, the office the candidate is seeking, and indicates that the candidate has approved the broadcast." BCRA § 305(a)(3) (adding 47 U.S.C. 315(b)(2)(D)). The district court correctly held that plaintiffs lack standing to challenge BCRA § 305. See Supp. App. 467sa-472sa (Henderson); *id.* at 1008sa (Kollar-Kotelly). In any event, plaintiffs' challenge lacks merit.

1. Plaintiffs' claim of injury resulting from BCRA § 305 rests entirely on the affidavit of Senator McConnell. Senator McConnell testified that in prior campaigns, he has run advertisements "that made contrasts between me and my opponent." McConnell Aff. para. 12. He further testified that he would run similar advertisements in future campaigns because he considers it "important for Kentucky voters to have as much information as possible about the qualifications of those who choose to run for the office of United States Senator." *Ibid.*; see McConnell Br. 67.

Senator McConnell's current term does not expire until the year 2008. Because a candidate for federal office is entitled to the "lowest unit charge" for broadcast advertising only during specific periods directly preceding an election, see 47 U.S.C. 315(b)(1), BCRA § 305 has no immediate impact on any communicative activities in which Senator McConnell might wish to engage. Rather, "the earliest date he could feel the effect of [BCRA § 305] is 45 days before the Republican primary election in 2008." Supp. App. 470sa (Henderson). The length of time before Senator McConnell could be tangibly affected by the challenged provision, and the inevitable uncertainty regarding the type of advertisements he will wish to run if he indeed stands for reelection in 2008, precludes him from establishing that his alleged injury is "*certainly* impending." *Defenders of Wildlife*, 504 U.S. at

565 n.2. And neither Senator McConnell's affidavit nor plaintiffs' brief explains how his ability to inform Kentucky voters "about the qualifications of those who choose to run for the office of United States Senator" (McConnell Aff. para. 12) would be compromised if he were to state his approval of the relevant broadcasts in the manner specified by BCRA § 305—a course of action that would allow him to refer directly to opposing candidates while retaining his entitlement to the "lowest unit charge."

2. BCRA § 305 does not violate the First Amendment. Contrary to plaintiffs' contention (McConnell Br. 68), BCRA § 305 does not discriminate on the basis of viewpoint. Rather, it applies by its terms to all radio and television broadcasts that make a "direct reference" to a candidate's opponent, regardless of the party affiliation of either candidate or the message that the sponsoring candidate seeks to convey. BCRA § 305 is not invalid simply because it may induce candidates to include in their advertisements a statement of personal approval that they would not otherwise make. An FCC regulation that long predates BCRA requires that the sponsor of *every* broadcast advertisement must be identified within the advertisement itself. See 47 C.F.R. 73.1212 (2002). Although BCRA § 305 imposes additional requirements regarding the *manner* in which the sponsorship-identification information must be conveyed, plaintiffs do not explain why that greater specificity should alter the constitutional analysis. Indeed, BCRA § 305 is in one significant respect *less* burdensome than the pre-existing FCC rule, since it applies only if the candidate invokes his statutory entitlement to the "lowest unit charge."

BCRA § 305 reflects Congress's determination that, if a candidate for federal office seeks the "lowest unit charge" for a broadcast advertisement that includes a direct reference to his opponent, the candidate should identify himself as the

sponsor in a particularly clear and unmistakable manner.[54] See 147 Cong. Rec. S2693 (daily ed. Mar. 22, 2001) (statement of Sen. Collins). Federal candidates have no First Amendment right to utilize the broadcast media anonymously, let alone to do so at a particularly favorable rate. They likewise have no constitutional right to avoid a mode of sponsorship-identification that is especially likely to achieve its intended objective.

D. The Disclosure Requirements In BCRA § 504 Are Constitutional

BCRA § 504 requires a broadcast station to maintain and make publicly available a complete record of requests to purchase broadcast time to "communicate[] a message relating to any political matter of national importance, including * * * a national legislative issue of public importance." BCRA § 504 (adding 47 U.S.C. 315(e)(1)(B)). Plaintiffs' First Amendment challenge to that provision (McConnell Br. 73-75) lacks merit.[55]

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[54] The analogous FCC rule, in addition to requiring generally that the sponsor of broadcast advertising be identified within the advertisement itself, see 47 C.F.R. 73.1212(a)(1) and (2) (2002), imposes more specific sponsorship-identification requirements with respect to candidate advertising. See 47 C.F.R. 73.1212(a)(2)(ii) (2002) ("In the case of any television political advertisement concerning candidates for public office, the sponsor shall be identified with letters equal to or greater than four percent of the vertical picture height that air for not less than four seconds."). Thus, the fact that BCRA § 305's more specific sponsorship-identification requirement is triggered by the content (but not the viewpoint) of the pertinent advertisement reflects no departure from the established principles governing broadcast communications.

[55] BCRA §§ 305 and 504 impose distinct types of sponsorship-identification requirements, though the two provisions serve closely related purposes. BCRA § 305 requires, as a prerequisite for entitlement to the "lowest unit charge," that the sponsor of certain broadcast advertisements must be identified in a specified manner *in the advertisement itself.* BCRA § 504 applies to a broader class of advertisements and requires that additional information be submitted to the broadcast licensee and made

1. Plaintiffs contend (McConnell Br. 73) that the First Amendment bars Congress from imposing disclosure requirements for speech that does not expressly advocate the election or defeat of a candidate for public office. That argument is foreclosed by this Court's precedents. See *Bellotti*, 435 U.S. at 792 n.32 (State may require disclosure of sponsor of corporate advertisement regarding referendum proposal); *Buckley* v. *Am. Constitutional Law Found.*, 525 U.S. 182, 202-203 (1999) (State may require disclosure of the names of ballot initiative petition sponsors and the amounts paid to gather support for the initiatives).

2. As explained in the government's brief in opposition to the motion for summary affirmance on this issue filed by plaintiff National Association of Broadcasters (NAB), longstanding FCC regulations impose disclosure requirements with respect to the sponsorship of broadcast matter "involving the discussion of a controversial issue of public importance." 47 C.F.R. 73.1212(d) and (e) (2002); see 47 C.F.R. 76.1701(d) (2002) (same standard used in disclosure regulation governing cablecasting). By enabling viewers and listeners to identify the persons actually responsible for communications aimed at a mass audience, those regulations assist the public in evaluating the message transmitted. See *Bellotti*, 435 U.S. at 792 n.32 ("Identification of the source of advertising may be required * * * so that the people will be able to evaluate the arguments to which they are being subjected.").

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publicly available upon request. Both provisions have close analogues in longstanding FCC regulatory requirements. See 47 C.F.R. 73.1212(a), (d) and (e) (2002); p. 130, *supra*; p. 132, *infra*. Plaintiffs' mode of attack on BCRA §§ 305 and 504—characterizing those provisions as unprecedented assaults on the First Amendment, while simply ignoring their established historical antecedents—is symptomatic of plaintiffs' approach to the entire case.

The range of information required to be disclosed under BCRA § 504 is comparable to the disclosures mandated by pre-existing FCC rules. Compare 47 U.S.C. 315(e)(2)(G) (added by BCRA § 504), with 47 C.F.R. 73.1212(e) and 76.1701(d) (2002). Plaintiffs do not attempt to show that BCRA § 504's requirements are more onerous than the FCC's longstanding rules, nor do they contend that the pre-existing agency regulations are themselves unconstitutional. See generally 02-1676 Gov't Br. in Opp. to Mot. of NAB for Summ. Aff. 4-9. Because BCRA § 504 is essentially a codification of established and unchallenged regulatory requirements, plaintiffs' First Amendment claim should be rejected.

3. Plaintiffs' vagueness argument (McConnell Br. 74-75) also lacks merit. Broadcasters have evidently achieved a workable understanding of FCC disclosure requirements that apply to broadcast matter "involving the discussion of a controversial issue of public importance." 47 C.F.R. 73.1212(d) and (e) (2002); 47 C.F.R. 76.1701(d) (2002). Plaintiffs offer no reason to believe that the BCRA terms "political matter of national importance" and "national legislative issue of public importance" will be more difficult to comprehend. See generally 02-1676 Gov't Br. in Opp. to Mot. of NAB for Summ. Aff. 2-4.

E. BCRA § 318, Which Prohibits Any Minor From Making A Contribution To A Federal Candidate Or Political Party, Is Constitutional

1. This Court's decision in *Beaumont* forecloses the Echols plaintiffs' argument (Br. 34 n.38) that BCRA § 318 is subject to strict scrutiny. In *Beaumont*, a nonprofit corporation "argue[d] that application of the ban on its contributions should be subject to a strict level of scrutiny, on the ground that [2 U.S.C.] § 441b does not merely limit [corporate] contributions, but bans them on the basis of their source."

Beaumont, 123 S. Ct. at 2210. The Court rejected that contention, explaining that "restrictions on political contributions have been treated as merely 'marginal' speech restrictions subject to relatively complaisant review under the First Amendment." *Ibid.*; see p. 35, *supra*. The Court further observed that "the difference between a [contribution] ban and a limit" is properly considered "when applying scrutiny at the level selected, not in selecting the standard of review itself." *Id.* at 2211. Similarly here, the fact that BCRA § 318 bans rather than limits contributions by minors to federal candidates and political parties is relevant to the First Amendment analysis, but it provides no basis for applying strict scrutiny.

2. BCRA § 318 is a valid means of preventing circumvention of the FECA/BCRA contribution limits by adults who might otherwise use minors as surrogate contributors. Minors have historically been barred from voting, from entering into binding contracts, and from disposing of property. BCRA § 318 therefore does not meaningfully burden any right that minors have traditionally been understood to possess. Congress surely has power to identify *some* minimum age for making political contributions, and it reasonably chose the age at which individuals acquire a host of other political, civil, and property rights. BCRA § 318 will have no meaningful impact on the ability of candidates and parties to acquire the resources needed for their own advocacy—the principal constitutional value implicated by contribution limits. And because BCRA § 318 bars only transfers of money to federal candidates and political parties, it leaves minors free to volunteer for federal campaigns and to engage in a variety of other political activities. See generally 02-1676 Gov't Br. in Opp. to Mot. of Echols, et al., for Summ. Aff. 2-9.

CONCLUSION

The Court should sustain the constitutionality of BCRA and should affirm in part and reverse in part the judgment of the district court.

Respectfully submitted.

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